JOURNAL

OF

COMPARATIVE LEGISLATION

AND

INTERNATIONAL LAW

EDITED FOR

THE SOCIETY OF COMPARATIVE LEGISLATION

BY

F. M. GOADBY, Esq., D.C.L.

Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

THIRD SERIES VOL. XXVI PARTS III & IV

LONDON:
SOCIETY OF COMPARATIVE LEGISLATION,
28 ESSEX STREET, LONDON, W.C.2
1944

[*All Rights reserved*]

All communications to be addressed to the Hon. Editor,
28 Essex Street, London, W.C.2
The Annual Subscription to the Society is one guinea. (*Canada and U.S.A.* $5).

Printed in Great Britain by
Hazell, Watson & Viney, Ltd., London and Aylesbury

CONTENTS OF VOLUME XXVI

PARTS III AND IV

PAGE

JUBILEE OF THE SOCIETY 1

NETHERLANDS : LEGISLATION IN EXILE 4
Contributed by DR. J. H. ZEEMAN.

LEGAL AID FOR THE POOR IN SOUTH AFRICA 12
Contributed by J. D. HAYMAN, ESQ., M.A., LL.B.

UNIFORMITY OF LAWS 16
Contributed by F. H. LAWSON, ESQ., M.A.

RECOGNITION OF FOREIGN FORMS OF STATUS 27
Contributed by R. H. GRAVESON, ESQ., Ph.D., S.J.D., LL.M., R.A.S.C.

NATIVE TRIBUNALS IN THE GOLD COAST COLONY 30
Contributed by H. B. THOMAS, ESQ., O.B.E.

THE INTERNATIONAL LAW OF THE FUTURE 35
Contributed by F. N. KEEN, ESQ.

LAND TENURE IN MAURITIUS AND FIJI 42
Contributed by C. K. MEEK, ESQ., D.Sc.

CZECHOSLOVAKIA'S EXPERIENCE WITH P.R. 49
Contributed by DR. ED. TABORSKY.

CO-ORDINATION OF ALLIED ENEMY PROPERTY DEPARTMENTS . . . 51
Contributed by MAX MEYER, ESQ., LL.B.

MEETING OF THE INTER-AMERICAN BAR ASSOCIATION 55

NOTES :

Lord Atkin 61

Professor A. Berriedale Keith 61

Parliamentary Control of Delegated Legislation. J. Christie . . . 62

Philadelphia Conference. C. E. A. B. 63

Legal Reform in Abyssinia. F. M. Goadby 64

McNaghten Rules. C. E. A. B. 65

Parliamentary Procedure in New Zealand. J. Christie 66

Commorientes. F. M. G. 67

Income Tax in Great Britain and the Dominions 67

Workmen's Compensation 69

The Conflict of Tribal Laws 70

Criminal Responsibility 71

Legislative Procedure. C. T. C. 71

Dumbarton Oaks Conference. F. N. Keen 73

Unconstitutional Legislation in the States of America. C. T. C. . . 74

Books for Foreign Libraries 75

Immovables in the Conflict of Laws. F. M. G. 75

Erratum 75

CONTENTS

PAGE

NOTICES OF BOOKS:

Amadeo, Santon P., *Argentine Constitutional Law.* M. 75

Fox, Harold G., *The Canadian Law of Copyright.* R. O'S. 76

Sereni, Angelo Piero, *The Italian Conception of International Law.* H. C. Gutteridge 77

Khadduri, Majid, *The Law of War and Peace in Islam.* F. M. Goadby . 80

Lewin, Julius, *An Outline of Native Law.* C. K. Meek 80

Friedmann, W., *The Crisis of the National State.* F. N. Keen . . . 81

Constitutional Provisions concerning Social and Economic Policy. C. E. A. B. 81

Balogh, Elemer, *Political Refugees in Ancient Greece.* F. E. A. . . 82

Liesbesny, Herbert J., *The Government of French North Africa.* C. K. Meek 83

Pink, Gerhard P., *The Conference of Ambassadors (Paris, 1920–1931)* F. J. C. Hearnshaw 85

Nussbaum, Arthur, *Principles of Private International Law.* J. M. J. . 86

Brierly, J. L., *The Law of Nations.* F. M. G. 86

Feilchenfeld, Ernst H., *The International Economic Law of Belligerent Occupation.* Egon Schwelb 87

Gordon, E. D., *A Code of the Criminal Law of Palestine.* F. M. G. . . 88

De Felice, Theodore, *Gouverenements nationaux et accords internationaux.* M. Sarfatti 88

Ziegler, B. M., *The International Law of John Marshall.* M. F. P. H. . 89

Reid, Charles, *British Police and the Democratic Ideal.* K. G. M. . . 90

Keith, A. B., *Wheaton's International Law—War.* M. F. P. H. . . 90

"*Pocta.*" V. R. Idelson 91

THE JUBILEE OF THE SOCIETY

DECEMBER 19 will mark the Jubilee of the founding of the Society at a meeting held in the Imperial Institute under the chairmanship of Lord Herschell, then Lord Chancellor. Sir Courtenay Ilbert, who had previously read a paper on the subject of the study of Comparative Legislation, was the prime mover in its formation. The substantive resolution moved from the Chair was:

> "That it is expedient to establish a Society of Comparative Legislation, with the object of promoting knowledge of the course of legislation in different countries, more particularly in the several parts of Her Majesty's Dominions, and in the United States."

In a statement printed in the now rare first volume of the Society's *Journal* the objects of the Society were announced as "both practical and scientific." "The Society," it was added, "is intended to be of service to legislative bodies, practising lawyers, jurists and students of sociology." Similar societies were already in existence in France and Germany. One was also said to exist in the United States, but after undergoing various vicissitudes it has failed to attain a definite recognized status.[1] The French Society primarily devoted its activities to the countries in the Continent of Europe while the English Society made its chief aim the collection of information as to the statute law and the forms and methods of legislation in the British Empire and the United States.

The Society from the outset was fortunate in securing the support of eminent lawyers and statesmen as members of the Council, while those who took a more active part on the executive committee included Mr. (afterwards Sir) Thomas Barclay, Mr. (afterwards Sir) Mackenzie D. Chalmers, Mr. Newton Crane, representing the American Bar, Master (afterwards Sir) John Macdonell, and Sir Charles Tupper who used his influence to further its work in the Dominion of Canada. The first two joint honorary secretaries were Mr. (afterwards Sir) Thomas Raleigh and Mr. (afterwards Sir) Albert Gray, who held office for four years. They were succeeded by Mr. W. Rutherford, who was obliged to resign owing to ill-health in less than twelve months when Mr. Edward Manson was appointed Secretary and became with Master Macdonell joint editor of the Society's *Journal*.

The first publication was the review of legislation covering the year 1895 and the problem of the exact period to be covered was then defined to be the sessions ending in 1895, whether begun in 1894 or 1895, and the sessions which began in 1895 but did not end until 1896 were left until the next issue. The more general adoption of the calendar year has solved this problem in recent years. At the outset the summaries of legislation were provided mainly by contributors in this country but that is now the exception, as the Society is fortunate to have the collaboration of correspondents with local knowledge and very often actively engaged in the preparation of the legislation. Other important contributions to the first volume included a paper on the German Civil Code by Dr. Ernest Schuster. In the same issue Sir Courtenay Ilbert published the replies to a questionnaire on modes of Colonial legislation sent out with the co-operation of the Colonial Office through the personal interest of Mr. Joseph Chamberlain. They were afterwards incorporated by him in his work on "Legislative Methods and Forms." The contribution which especially enhanced the value of this volume was the work of a sub-Committee whose report was written by Master Macdonell on the methods of legal remuneration in contentious matters in various European countries and the United States.

At the annual meeting held on March 10, 1897, it was observed that "of our subscribing members nearly half are drawn from the Colonies and foreign countries." Lord Herschell expressed his regret "that the Society, though it was doing excellent work, had not attracted more attention among members

[1] A letter from Canada recently addressed to the Society of Comparative Legislation in New York was forwarded from there to the Society in London.

of the English legal professions. It seems that the active co-operation of lawyers, except those who interest themselves in what are deemed academic subjects, cannot at present be hoped for; and it is of the highest importance to ascertain why this is the case." Mr. E. M. Underdown attempted to provide an answer based mainly upon the difference of the position held by law in England " where it has been regarded as a closed book by the layman " from that which it possesses in Continental countries where " the everyday occurrences of life are so regulated by legal rules that everyone must have some knowledge of legal principles."

The change in the Secretaryship was followed by the transfer of the publications of the Society from Rivington's to John Murray. The death of the first President, Lord Herschell, provided the opportunity for the publication of the first of a series of portraits, which, for many years, were a notable feature of the *Journal*. The active interest of Mr. Joseph Chamberlain enlisted the co-operation of the governments throughout the Empire, which has been so well maintained, that without exception all are subscribers and from time to time some of them have made special grants.

Lord Herschell was succeeded as President of the Society by Lord Russell of Killowen. At the meeting electing him in March 1899, several additions were made to the Committee. They included Mr. J. A. Simon—the present Lord Chancellor.

Lord Russell's death in 1900 terminated his short term of office and in the following year Lord Rosebery accepted the Presidency of the Society with Lord Davey as Chairman of the Executive Committee. Meetings were held in 1901 at which Mr. Montague Crackanthorpe read a paper on " Crime and Punishment from the Comparative Point of View," and Mr. R. B. (afterwards Lord) Haldane, K.C., M.P., another on " The Constitution of the Empire and the Development of its Councils." In 1906 Mr. Pember Reeves addressed a general meeting on " Legislation in New Zealand." At the time of the Imperial Conference in 1907, proposals to hold a general meeting at which the Colonial Premiers might be present were discussed. Mr. Ramsay Macdonald offered to give an address on " The Labour question in Australia," but it was resolved " that the topic was not one suitable to the Society." The proposal appears to have been dropped. The next general meeting was in February 1908 to hear an address in Gray's Inn Hall by Syed A. Majid on " Wakf or Family Settlement among the Mahomedans." In the same year Lord Rosebery presided at the annual meeting when there was a regrettably small attendance which led to the discontinuance of attempts to gather together members of the Society. Sir Courtenay Ilbert spoke on the work and prospects of the Society.

For a time the Finances of the Society gave some cause for anxiety and appeals were made for a larger measure of support. One of the first responses came significantly from the Board of Trade in 1903 in the form of a grant of £100 as a practical recognition of the value of the Society's work.

Arrangements were made in 1912 for the publication by John Murray in volume form of a series of articles on " Great Jurists." The volume has maintained a steady sale and the Edition was sold out in 1943. At the same meeting Mr. R. E. Willcocks was appointed as assistant secretary to Mr. Manson and Mr. C. E. A. Bedwell was invited to assist with the Editorial work. Upon Mr. Wilicocks relinquishing the secretarial work to undertake war service in 1917, Mr. Bedwell became responsible for both branches of the work.

Constitutional developments were approved at the annual meeting in 1915, when it was agreed that invitations should normally be extended to the Prime Minister, the Lord Chancellor, the Secretary of State for the Colonies, the Secretary of State for India and the High Commissioners of Canada, Australia, South Africa and New Zealand and a representative of the Crown Agents for the Colonies to allow their names to be placed on the Council. At the same

meeting there was instituted a new form of honorary life membership in order to recognize services to the Society. The Committee also, while expressing to Mr. John Murray their thanks and appreciation of his support and co-operation for many years, themselves undertook the publication of the *Journal*.

Mr. Manson's resignation of his work as editor and secretary in 1917 terminated the partnership which had existed with Sir John Macdonell in the editing of the Society's publications. In supporting a motion of regret that it was due to ill-health, Sir John Macdonell referred to the zeal, tact and sympathy shown by Mr. Manson in the work of editing and as secretary. He hoped that the *Journal* might still receive from time to time additions to those contributions in which he displayed a light and undefinable touch of literary skill almost unique in legal literature. Mr. Bedwell was appointed as honorary secretary and the editorial work was entrusted to an editorial committee which only continued for a short time. A clerk was appointed to be regularly available in the Office of the Society, which was established at 1, Elm Court.

In 1921, the Society lost Sir John Macdonell who, with Sir Courtenay Ilbert, had been one of the original founders of the Society and at the time of his death was also Vice-Chairman of the Executive Committee. As an Editor Sir John Macdonell had a remarkably fertile mind in suggesting subjects for contributions to the *Journal* and his association with *The Times*, combined with his position as senior Master of the Supreme Court, gave him a wide range of contacts. As Vice-Chairman he was succeeded by Sir Albert Gray, and the editorial work for a short time was undertaken by Sir Lynden Macassey as the editorial committee was disbanded upon the death of Sir John Macdonell.

With a view to the development of the relationship of the Society with foreign countries, Mr. H. C. Gutteridge at the same meeting was associated as joint secretary with Mr. C. E. A. Bedwell.

The death of Sir Courtenay Ilbert in 1924 was an irreparable loss to the Society. From its foundation he was the inspiring influence whether someone else occupied the chair of the Executive Committee, or he himself directly guided it in that position as he did for some years before his death. The Society may claim to have embodied two of his chief characteristics in maintaining a scientific study of legislation, both of its form and of its contents, and a certain retiring modesty which has operated against its adequate public recognition.

Sir Albert Gray succeeded in the chairmanship of the Society with Mr. Justice (afterwards Lord) Atkin as the Vice-Chairman, and through the advocacy of the latter financial support was obtained from the four Inns of Court.

Upon the death in 1925 of Dr. Ernest Schuster, an arrangement was made with the Governors of the London School of Economics for the safe custody of his library of comparative law which he had bequeathed to the Society. Besides undertaking this obligation the Governors have also generously allowed the use of their Library to the members of the Society, since it has always been recognized that the establishment of a comprehensive library of the laws of all countries was beyond the scope of the Society's capabilities. Nevertheless their interest in the project has been maintained and when the material was not on the scale which it has attained at the present time, it was hoped that it might be possible to compile a combined catalogue to be housed in the Society's chambers.

Sir Lynden Macassey, having relinquished the post of Editor, was succeeded for a short time by Sir Anton Bertram who, in turn, was replaced by Sir Maurice Amos and Dr. F. P. Walton. The last-named became sole editor in 1926. On the death of Sir Albert Gray, who had taken an active part in the Society's affairs from the beginning, Lord Atkin was elected Chairman in 1928 with Sir Lynden Macassey as Vice-Chairman.

Upon Lord Rosebery's death in 1929, Lord Reading accepted the office of President.

Dr. Walton resigned the Editorship of the *Journal* in 1932. The Committee recognized that its standard had been not only maintained but enhanced during his six years' tenure of the Office. Dr. F. M. Goadby was appointed as his successor.

Lord Atkin resigned the chairmanship of the Executive Committee in 1932 and the present Chairman, Lord Macmillan, consented to succeed him. Upon his return from a visit to South America the Committee took the opportunity to invite the members of the Society to a Dinner in December 1935 to welcome him. The success of the gathering showed that the members were glad of the opportunity, especially as it enabled them to express appreciation of the services of their Chairman.

In 1936 the death of Lord Reading created a vacancy in the office of President and the Right Honourable S. M. Bruce, the High Commissioner of Australia, consented to succeed him.

The period of the war has provided opportunities as well as occasional vicissitudes for the Society. The presence of foreign lawyers in the country was made the occasion for the delivery of a course of four lectures on English Laws and Institutions by Sir Alison Russell, Sir Cecil Carr, Mr. C. E. A. Bedwell and Mr. Richard O'Sullivan in response to their requests. The membership of the Society has steadily increased, though the temporary cessation of the grants from the Inns of Courts has seriously affected the finances. The effect has been mitigated by the sympathetic assistance of the Canadian and American Bar Associations as well as by contributions from other parts of the Empire. The destruction of the headquarters of the Society in 1, Elm Court, so well known to members all over the world, was followed by a second removal owing to further enemy action. This has naturally created difficulties with correspondence in spite of the ready assistance of the Post Office.

It seemed to be desirable at this milestone in the history of the Society to make some survey of its progress and development, if only to record how well and truly the foundations were laid by men no longer here. It is necessarily fragmentary, as in some cases are the records upon which it is based, but the continuance of its primary work in spite of two world wars and other vicissitudes at a standard higher than at the time of its foundation, is evidence that it performs a function found to be useful throughout the Empire, in the United States and in other countries.

LEGISLATION IN EXILE: THE NETHERLANDS

[*Contributed by* Dr. J. H. Zeeman.]

In order to give a correct survey of the Netherlands legislation in exile, a short statement on the lawmaking in peacetime in the Netherlands seems to be called for. In connection herewith one should bear in mind that the parts of the Netherlands Kingdom situated in Asia and America (the Netherlands East Indies, Surinam and Curaçao) have obtained to a very large measure the power to legislate for their territories. This fact influenced the emergency legislation passed in the United Kingdom, since the occupation of the Netherlands East Indies.

The power to legislate is in the hands of King and Parliament (Staten-Generaal), according to Article 112 of the Constitution. Parliament is divided into two chambers, the First and Second Chamber.

Article 56 of the Constitution invests the King with the executive power; Article 57 authorizes the King to make Orders in Council ("algemeene maatregelen van bestuur"). This kind of decree is related to the laws promulgated by King and Parliament in nearly the same way as the "Orders in Council"

to "Acts of Parliament" in England.[1]. It may be mentioned here that Common Law in the sense as this is known in England does not exist in the Netherlands.

These Orders in Council relate either to the elaboration of laws, in which such an elaboration is prescribed or granted to the Crown, or to subjects which are not regulated by law, nor are reserved for the legislation of King and Parliament (Art. 112 of the Constitution).

In the third place there are a great many Royal Decrees in existence, called "Koninklijke Besluiten." This kind of decree is used whenever a law gives rise to further detailed enactment, though not prescribing the method of "Algemeene mattregelen van Bestuur."

It is in the form of the last-named Royal Decrees that all the appointments are made by the Crown, whether emanating from a law or an Order in Council. And the same form is again used for the publishing of all matters of a general interest, as, for instance, those treaties which have been ratified by the legislature.

There is a difference, both formal and material, between the Orders in Council and the Royal Decrees.

The former *must* mention the fact that the Raad van State (Privy Council) has advised on them, and contains as a rule matters of a more general and permanent nature; the latter are promulgated without the advice of the Privy Council and are usually of a lesser scope.

The base for the legislation in the overseas territories is to be found in the Articles 62, 63 and 64 of the Constitution.

In broad principle, the general government is delegated to the Governor-General in the Netherlands East Indies, and to Governors in Surinam and in Curaçao, who rule in the King's name on lines laid down by the law and with the restriction that this regional legislation must abstain from matters which either by the Constitution or by the law are reserved to the King.

In other words, the legislatures of the overseas territories have attained autonomy in internal affairs. But it is the law which prescribes the general outline, and it is again the law which may reserve the enactment of named subjects for the King.[2]

Since the occupation of the Netherlands on May 14, 1940, the Queen and Her Government have taken up temporary residence in London. Her Majesty has since made regulations even in those matters which, according to the Constitution, ought to be dealt with by the normal legislature.

As only a small part of Her Privy Council accompanied Her Majesty, the difference between Orders in Council and Royal Decrees disappeared. The whole of emergency legislation is thus performed in the *form* of a Royal Decree, a Decree made by Her Majesty in collaboration with Her Ministers, and countersigned by at least one of these Ministers.

Materially these Royal Decrees contain, however, laws, Orders in Council and the ordinary Royal Decrees.

This emergency-legislation of the Netherlands Government in the United Kingdom is restricted by the state of emergency itself, to wit:

(*a*) There must be a real emergency;

(*b*) The legislative measures must be necessarily in connection with the emergency.

The principle was clearly expressed by the Governor-General of the Netherlands East Indies, in his answering memorandum on the Budget for 1941, published in the November 8, 1940, issue of the weekly *Economisch Weekblad*

[1] The so-called conventions by which sometimes, in contradiction to the literal wording of the constitution, the balance between King and Parliament shifted to the latter, are here not taken into account.

[2] Mr. W. G. Peekema in his article "Imperial Relations within the Kingdom of the Netherlands (*Jour. Comp. Leg.*, third series, vol. XXIV, pp. 90-107) has dealt with this problem in a much more extensive way.

voor Nederlandsch Indie, a publication of the Netherlands Indian Department of Economic Affairs,

> "Under East Indies Constitutional Law various subjects must be regulated, approved or ratified by law. According to the Netherlands Constitution, the legislative power is exercised by the King and the States-General jointly. Since because of the armed enemy occupation of the mother-country the States-General temporarily cannot function, legislation cannot be effected in the normal manner. In this emergency situation, the body which is in a position to freely exercise its constitutional function, the Crown, i.e., the Constitutional Head of the State, with its councillors, is (with the exception of a reservation hereinafter to be mentioned) also authorized to do everything which in normal times would be done by other bodies together with the Crown. If one recognizes the Netherlands Government which has temporarily transferred its residence to London, in order to safeguard the free exercise of its duties as the legal Government of the Kingdom—and except the enemy there is nobody who is doubtful about that point—then there is no other possibility than to accept also that the Crown has the same rule-making powers for the Kingdom and the overseas territories as pertained previously to the Constitutional bodies in the Netherlands. All acts of legislation for which the Constitution designates the Crown, albeit jointly with the States-General, will be effected by the Crown alone as the States-General by reason of the enemy-occupation of the mother-country are not able to co-operate. The result of such an act of legislation is as a matter of form a Royal Decree, but as a matter of substance a law."

The reservation mentioned in the foregoing is to the effect that the wide powers mentioned above are based on emergency law and find, therefore, their natural limitation in what under prevailing circumstances *required* legislative enactment.

The position of Netherlands emergency legislation and of such legislation of other Allied Governments, residing in the United Kingdom, has often been discussed.[3]

As to Netherlands law, a very positive statement is to be found *in re Amand,* where

> "It was contended that, without the authority of Parliament, no foreign power could recruit an army in this country. But the British Government recognized Queen Wilhelmina and Her Government as the Government of the Netherlands and as exclusively competent to perform the legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands. The decision to summon Dutch nationals was recognized by the Allied Forces Act, 1940, passed into law on August 22, 1940. The fact that the date of the Act was subsequent to the Royal Decree of the Queen of the Netherlands was academic, because the actual date involved was March 14, 1941, although he was most reluctant to suggest that the fact that the Sovereign and Government of our Ally should call to their aid Dutchmen resident here would be a breach of the Sovereign rights."[4]

Further, I may quote from Mr. Justice Shientag's opinion (*Harold Anderson* v. *N. V. Transandine Handelmaatschappij et al.* N.Y. L.J. January 1942, p. 251):

> "The circumstances that the Royal Netherlands Decree of May 24, 1940, was promulgated in London, England, rather than at The Hague, is immaterial, in view of the fact that our Government has officially recognized the Netherlands Government since its temporary residence in London."

[3] Dr. Egon Schwelb in his article "Legislation in Exile: Czechoslovakia" (*Jour. Comp. Leg.,* third series, vol. XXIV, p. 120) and the literature cited therein.

[4] Prof. Berriedale Keith's note (*Jour. Comp. Leg.,* third series, vol. XXIV, p. 131).

Again, Mr. Justice Pecora, *in re Amstelbank N.V.* v. *Guaranty Trust Company of New-York* (N.Y. L.J. February 17, 1942, p. 732), says:

> " The Government of the United States has refused to recognize the German military control of Holland. Any Decrees by this unrecognized occupying force would not have " the force and effect of mandates of a lawful sovereign." *Moscow Fire Ins. Co.* v. *Bank of New-York & Trust Co.*, 280 N.Y. 286. In withholding recognition of the Nazi-régime in continental Netherlands, the Government of the United States has made a determination of policy, which our courts should follow."

The Netherlands Constitution contains some articles which indicate that emergency legislation, made by the Crown, is envisaged. Article 21 of the Netherlands Constitution has been written with the intention of safeguarding the independence of the country, particularly by preventing an indefinite removal of the seat of the Government, for instance, through an alteration of dynastic circumstances. In the prevailing case temporary residence in London was taken up by the Netherlands Government to enable it to fulfil its constitutional duties in the best interests of the nation which, in existing circumstances consists chiefly of the defence of the independence of the Netherlands.

The meaning of this article of the constitution has been elaborated in the leading work on Netherlands constitutional law by Prof. A. Struycken.

> " It must be observed that no sanction is threatened for violence of Article 21 of the Constitution. The Constitution does not mention the loss ' of royal power nor the invalidity of the actions of a Government residing outside the country.' Article 21 constitutes a constitutional duty, the observance of which ' is left to the King.'
>
> " In F. J. A. Huart, *Grondwetsherziening* 1917–1922 *Arnhem* 1925, page 29, we find the following remarks on Article 21: As Struycken has said (*Staatsrecht*, page 332), it was asked in the divisions of the First Chamber whether Article 21, paragraph 2, should not explicitly permit the temporary transfer of the seat of Government in times of emergency (*V. V. le K.* p. 6). The Government answered in the negative: ' the possibilities—the Government wrote—(*M.V.A. le K.*, p. 5) which may make transfer of the seat of the Government outside the Rijk inevitable, cannot be adequately described in the Constitution '; the deviation from the constitutional prohibition would have to be accepted, especially since many regulations of the Constitution could not be strictly observed in the case of enemy invasion. *Impossibilium nulla obligatio.*'
>
> " These passages from Struycken and Huart show that what I called ' emergency circumstances which render imperative the creation of emergency law ' are recognized not only by prominent writers of Netherlands constitutional law, but also by someone speaking on behalf of the Netherlands Government, whose statement was accepted by Parliament."

The identical point has been discussed by English jurists who came to the same conclusion.[5]

[5] *Cf* McNair in the *Law Quarterly Review*, vol. LVII, at p. 68: " Unless the laws of the Allied country limit the validity of governmental acts to those done upon the territory of that country or a particular portion of it, I submit that it is immaterial in an English court where the official act is done—be it in the home territory, or be it on British territory whereon His Majesty has consented to the establishment of the Allied Government and the exercise of its governmental functions.

" I am aware of no principle of international law which says that a Government cannot act validly upon foreign territory with the consent of the local sovereign. [In the case of Savini, *Annual Digest*, 1927-1928, Case No. 106, the Court of Appeal in Rome had to consider the effect of the acts of the Montenegrin Government when dispossessed and enjoying the hospitality of Italian soil during the occupation of Montenegro by Yugoslavian troops, and held that in order that that Government might exercise rights of sovereignty within Italy exterritorially and without interference by the Italian courts,

Continued on page 8

I will now proceed to review the most important Royal Decrees in the period May 1940–January 1944.

These Decrees fall into two groups:

(*a*) Royal Decrees, bearing on the prosecution of the war.

(*b*) Several Royal Decrees which relate to the return of the Government to the Netherlands and have as yet not been published, on account of their secret character. For obvious reasons not much can be said as yet regarding the Royal Decrees of this last group.

They bear on:

(*a*) The different stadia in which, on the return to the Netherlands, the parliamentary democratic form of Government will be re-established.

(*b*) The expulsion from the legislative, executive, and judiciary bodies of those members who are considered untrustworthy.

(*c*) The prosecution of the so-called Quislings.

(*d*) The revision of the relations between the different parts of the Kingdom.

(*e*) Measures for the restoration of economic life.

Out of the first group of Royal Decrees I may mention the following:—

Royal Decree No. A.1.—In the Royal Decree of May 24, 1940, measures are laid down to prevent that possessions and claims, belonging to persons residing in occupied Holland, should be used against the interest of the Kingdom and its inhabitants.

The ownership of all these rights and claims, belonging to natural or legal persons, domiciled in Holland, as far as they are realizable in any form outside the Kingdom, became vested in the State, as represented by Her Majesty's Government in London.

This ownership is only used to protect the rights of the former owners, to whom their rights and claims return three months after the present extraordinary conditions have come to an end.

The Government may return these rights at an earlier date, if assured that this will in no way whatever benefit the enemy.

This Royal Decree No. A.1 has been amplified once. Since the Netherlands East Indies became occupied, a corresponding regulation has been made for that part of the Kingdom.[6]

The Royal Decree No. A.6 of June 7, 1940, set up a commission to control the economic and financial war-time relations. Any intercourse, other than strictly personal, with those residing in enemy and enemy-occupied territory is only allowed after permission has been obtained from this commission.

Furthermore, the commission is entrusted with the exercise of all rights, without any restriction, to which anybody or any matter or right in occupied territory is a party in any way.

it must enjoy full and formal recognition by the Italian Government, which was lacking.] On the contrary, the commanding officers of foreign public ships are allowed by the local sovereign to exercise jurisdiction over members of the crew in accordance with the law of their own country, and a similar jurisdiction is exercised over the members of foreign armed forces, at any rate in respect of offences committed while on duty or within their own lines. Moreover, when a Head of a State is visiting a foreign country, for instance, to take a cure for gout, it is the regular practice for official decrees and other documents requiring his signature to be sent to him for that purpose.

" I suggest therefore that the validity of the decree of an Allied Government made in London is no greater and no less than if it were made in its own capital, subject to any requirement of its own constitution as to the locality of governmental acts.

" Further, if the Allied Government has not been completely ousted from its territory and has non-European territory of which it is in control and to which it could resort, I do not see why the fact that the Government finds it more convenient to carry on the function of Government in London instead of, say, Curaçao or the Belgian Congo, should alter the legal quality of its acts. Particularly is this true when, as in the case of the Netherlands Government, the constitution recognizes no distinction between metropolitan and colonial territory and expressly provides that ' the Kingdom of the Netherlands comprises the territory of Holland, the Dutch East Indies, Surinam and Curaçao.' "

[6] Royal Decree No. C.18 of March 6, 1942.

Furthermore, the commission has been given the power to vest in itself certain rights or interests.

This Royal Decree underwent several modifications, it was made applicable to territory declared to be enemy, whilst its task was enlarged to matters relating to the Netherlands East Indies when that part of the Kingdom became occupied.

By Royal Decree No. C.2 of January 3, 1942, the commission was appointed to deal with legacies and wills of persons who died in occupied territory, in as much as these could have effect outside occupied territory.

By Royal Decree No. C.71 of October 29, 1942, similar rights were given to this commission with regard to copyright, and by Royal Decree No. D.37 of September 18, 1943, with regard to patents, designs, and trade marks.

It should be mentioned here, that in the Netherlands East Indies a similar commission had been established shortly after the outbreak of the war with Germany.

The Royal Decree No. C.64 of October 22, 1942, introduced a black list of those persons who on account of their relations with the enemy were assimilated with enemy subjects.

The Royal Decree No. A.2 of June 3, 1940, laid down the Netherland prize law. It was intended to enact the whole matter of prize law by Act of Parliament, binding in the whole Kingdom, and to be elaborated by Orders in Council. Due to the outbreak of war in Holland, the Royal Decree No. A.2 now gives only the material side of the law of prize, whereas the regulation on the procedure in cases of prize is now laid down in the regional decrees of the Netherlands East Indies, Surinam, and Curaçao.

The law of prize is for the greater part based on the relevant Hague Conventions of 1907 and on the London Declaration of 1909 ; it is enforced by prize courts, consisting of jurists, and giving their verdicts without possibility of appeal.

The Netherlands prize law has been altered and amplified in a number of Royal Decrees of a later date ; noteworthy is the Decree No. B.44 of May 31, 1941, giving two lists of contraband articles, an unconditional and a conditional list ; a free list does not exist.

The Royal Decree No. A.5 of June 6, 1940, introduces a preliminary seafaring duty. Through this instrument any Dutchman might be compelled to serve as a sailor. After this rather incomplete regulation many Royal Decrees, pertaining to the Netherlands Merchant Navy, have been issued. This had to be done, if one but remembers the very important place the Netherlands merchant fleet with more than two million tons of shipping has in the Allied war effort. Their contribution now ranks foremost since the loss of the Netherlands East Indies made an end to our export in raw materials.

These Decrees bear on a great many technical matters, e.g., personal safety regulations, the welfare of the personnel, a technical supervision of ships in the United Kingdom, the question of study, the passing of examinations, and the granting of certificates to the officers of the Merchant Navy ; the institution of a body to supervise the use of the merchant navy in close association with the Ministry of War Transport, the opening of a register for all seagoing vessels (Royal Decree No. B.70 of September 5, 1941), etc., etc.

In this relation the Decrees first forbidding the transfer of Netherlands merchant ships—partly already laid down in the Ships Requisitioning Act and the Shipping Space (Preservation) Act, both of 1939, and later vesting of the possession of these ships in the Government (Royal Decree No. C.17 of March 17, 1942) are of the highest importance.

This right to vest the possession relates to any ship flying the Netherlands flag, both during the war and for six months thereafter.

Not only the use of the merchant navy had to be ensured, but crews for these ships had to be provided for.

The Royal Decree No. A.5, as mentioned before, did not settle this question once for all ; sanctions were partially lacking.

For that reason the matter has been enacted anew in the Royal Decree No. C.19 of March 11, 1942.

In accordance with the rights given to the Netherlands Government by the Allied Powers (Maritime Courts) Act, 1941, all Dutchmen who did serve for at least six months on Netherlands ships since September 3, 1934, and who were engaged on or after May 15, 1940, in the service of any seagoing vessel, have to offer their services for the Netherlands Merchant Navy.

In this Royal Decree one finds sanctions on the wilful neglect of this seafaring duty.

To impose these sanctions and to try any criminal or summary offence performed on a Dutch ship by anybody who has not British nationality, Netherlands Courts have been established, in conformity with the principles laid down in the Allied Powers (Maritime Courts) Act, 1941.

This jurisdiction, which by now has been in force for two and a half years, to the benefit of the discipline on board Dutch merchantmen, is given for the lighter cases, comparable with summary offences, by the " Kantongerecht " (District Court) in London, for crimes by the " Rechtbank " (High Court) in London.

The Royal Decree No. A.15 of October 18, 1941, has set up yet another body. In Holland a " Raad voor de Scheepvaart " (Navigation Council) existed, whose task was to investigate disasters at sea where Netherlands ships were concerned, to control the behaviour of the crew, as far as this did not come within the penal jurisdiction, and to adjudicate infringements of maritime law (e.g., safety regulations).

As by far the greatest part of the Netherlands Merchant Navy now operates from England, it was considered most desirable that such a body of administrative jurisdiction should be set up in London ; this body is called " Buitengewone Raad voor de Scheepvaart " (Navigation Council Extraordinary).

At the same time a shipping inspection was created working on identical lines as in Holland and controlling the adherence to maritime laws and reporting infringements to the last-named Council.

The Royal Decree No. A.7 of June 28, 1940, gave rules regarding financial matters. A budget was created, as the constitutional authority on budgetary questions, i.e., according to Article 124 of the Constitution, King and Parliament, could not function.

The Royal Decree No. B.39 of May 1, 1941, provided for a Buitengewone " Rekenkamer " (Financial Control Board), comparable with an audit office whose duty it is to fulfil as far as possible the task which art. 186 of the Constitution has laid in the hands of the " Rekenkamer."

Both last-named Royal Decrees have been altered and this matter has been regulated by Royal Decree B.67 of July 31, 1941, which in turn underwent one alteration.

Compulsory military service for Netherlands subjects residing outside occupied territory is regulated in many Royal Decrees; this service has been extended to Dutchmen residing in the United Kingdom, Canada, South Africa, Australia, and the United States of America, in co-operation with the Governments of these countries.[7]

The Royal Decree No. B.28 of February 28, 1941, since replaced by the Royal Decree No. D.13 of April 29, 1943, instituted a savings system on the principles on which the " Postpaarbank " (Postal Savings Bank) in Holland had been working.

The Royal Decree No. B.78 of September 18, 1941, instituted compulsory

[7] The Allied Forces Act, 1940, 3 & 4 Geo. VI, c. 51, the base of this compulsory service has been discussed by Dr. E. Schwelb in an article in the *Czechoslovak Yearbook of International Law*, 1942, pp. 142-171.

taxation, which was, however, abolished by the Royal Decree No. C.33 of April 30, 1942.

As has been mentioned, the Netherlands Constitution contains a Privy Council. As this Council was not transferred to England, it was thought expedient to instal a similar Council in England, the Extraordinary Advisory Council, consisting of prominent Dutchmen.[8]

This Council has to be consulted on all drafts for general binding rules, which impose duties or prohibitions on Dutchmen, or Dutch subjects. The same applies to those Royal Decrees which relate to rights safeguarded by law.

The Government may ask the Council's advice whenever it sees fit to do so.

After the occupation of the Netherlands East Indies the Government of this part of the Kingdom had to be reorganized. In the place of the Governor-General who, in the name of the Crown (Minister of the Colonies), governs the Indies together with the " Volksraad " (Peoples Council), the Government was placed in the hands of the Minister of the Colonies. The latter has to exercise his duties as much as possible in conformity with the existing laws.

The Royal Decree No. C.44 of June 5, 1942, initiated an Advisory Council for Affairs pertaining to the Netherlands East Indies, composed of a number of members appointed by the Crown. The task of this Council is to advise the Government of the Netherlands East Indies. In some cases this advice must be asked for ; in other cases this is facultative.

In this connection the Royal Decree No. C.51 of September 2, 1942, should be mentioned. It lays down rules for the Netherlands East Indian budget during such time as this budget cannot be made in the normal way, to wit—by the Governor-General and the " Volksraad."

An office, the Netherlands Exchange Institute, was set up with the object of registering for exchange purposes all foreign assets which either belonged to companies the seat of which had been transferred to unoccupied territory or had previously been vested in the State of the Netherlands and entrusted to the care of custodians appointed for companies still established in enemy-occupied territory.

The persons involved are unable to dispose of these foreign assets without getting first the permission of the Netherlands Exchange Institute.

Apart from the Royal Decrees which have summarily been mentioned, the Netherlands legislation in exile contains many more. Many Decrees, for instance, have been promulgated to elucidate those mentioned ; so, again, many dealt with those alterations of Dutch law, which became necessary. For instance, many regulations have been made regarding educational matters, others enlarged the competence of the Netherlands consular officers, with regard to their right to record authentic statements.

Furthermore, governmental duties in respect of the Netherlands East Indies, Surinam, and Curaçao were performed by the Netherlands Government wherever the Constitution reserved them to the legislature.

As a last important item I may draw the attention to the setting up of courts-martial for Navy and Army, a procedure which has been sanctioned by the Allied Forces Act, 1940.

[8] Royal Decree No. C.26 of March 21, 1942.

LEGAL AID FOR THE POOR IN SOUTH AFRICA[1]

[*Contributed by* J. D. HAYMAN, ESQ., M.A., LL.B.]

LEGAL aid for the poor has recently been the subject of a detailed comparative study.[2] As, however, only a few passing references were made regarding the position in South Africa,[3] this short article has been designed primarily to supplement an excellent and otherwise comprehensive treatment of the topic.

In view of existing conditions in the Union,[4] it is rather surprising to find that the provision of legal assistance for the poor is of but recent inception and development there. Prior to 1940 there were practically no facilities whereby an indigent person was able to obtain professional advice as to his legal rights and obligations. And in the realm of actual litigation, *pro deo* defences in certain criminal charges and the *in forma pauperis* procedure in civil cases meet only a very limited part of the demand.

We find, however, the first effective seeds of the movement in 1937, when the South African Institute of Race Relations set up a Legal Aid Bureau in Johannesburg, the object of which was to furnish professional representation in those criminal charges where the accused indigent reasonably required such assistance. Panels of barristers and solicitors were formed, and those rendering services were paid reduced fees by the Bureau, which derived its funds from Institute grants and private donations. The Bureau was in the charge of a retired magistrate, who visited the prisoners' "yards"[5] daily in order to select cases requiring defence. On the non-criminal side the Bureau offered limited facilities for the assistance of poor persons with elementary advice.[6]

But by 1940 the necessity for the extension of the civil side of the work had become fully recognized, and as a result the Bureau was reconstituted in order to meet this primary need. The Institute, with the approval of the Incorporated Law Society of the Transvaal, secured the services of a qualified solicitor who was appointed full-time Director of the Bureau, and also a full-time African interpreter and clerk.

The almost instantaneous success of the Bureau is shown by the fact that by 1942 the Director was handling approximately 250 new cases a month, which, together with current cases and the return of old "clients" with fresh problems, resulted in over 7,000 interviews in that year. As a consequence of such volume of work it was found necessary to appoint part-time professional and clerical assistants.

This Bureau set the pattern for those which were soon to follow in various other centres in the Union, and so the following account of the sphere and scope of its activities may be regarded as typical.

The work of the Bureau falls broadly under two separate heads. (*a*) Criminal defence work from the "yards," and (*b*) the work at the office itself.

Under the first head the procedure is as follows:—A representative of the Bureau[7] visits the cells at the Magistrates' Courts every morning, and reports to the Director any indigent person there detained who has a prima facie

[1] The following publications of the S.A. Institute of Race Relations have provided much of the data in this article. (*a*) Three pamphlets dealing with legal aid: R.R. 114/42, 115/42, 145/42. (*b*) 13th and 14th Annual Reports, 1941-2 and 1942-3 respectively (hereinafter abbreviated "A.R."). (*c*) *Race Relations News*, the monthly organ of the Institute (hereinafter abbreviated "R.R.N.").

[2] Cohn, *Legal Aid for the Poor : A Study in Comparative Law and Reform.* 59 L.Q.R. p. 250 (continued p. 359).

[3] (*ibid*) at p. 359, n. 44; p. 362, n. 59; p. 369, n. 77; p. 376, n. 97.

[4] See further, *infra*, p. 15.

[5] i.e., the cells at the Magistrates' Courts. Note that in S.A. Magistrates are legally-qualified salaried officials.

[6] See: Hassard-Short *Legal Aid for the Poor.* 23 *Journal of Comparative Legislation.* (1941). pp. 27 ff.

[7] In Johannesburg it is the Supreme Court Interpreter.

reasonable defence. The Director then discusses the case with the Public Prosecutor concerned;[8] and if necessary arranges for one of the panel solicitors to conduct the defence free of charge, or intervenes to obtain a withdrawal of the charge, or arranges bail, or assists the accused in the conduct of his own defence.

Under the second head falls the greater part by far of the work of the Bureau, which may conveniently be subdivided thus:—

(1) Assisting persons (usually Africans), who have been assaulted or who have in other ways been the victims of a criminal act, to lay charges; and helping generally in the subsequent stages of such case by obtaining medical reports, referring witnesses to the police, and holding a watching brief throughout.

(2) Arranging for professional representation in suitable criminal cases, where the friends or relatives of the accused person apply to the Bureau for assistance or where the case in some other way comes to the notice of the Director.[9]

(3) Advising persons in civil matters. It is the policy of the Bureau to avoid litigation where possible, and this has been facilitated by the close relationship which the Bureau has established with the interested Government and Municipal Departments.[10]

(4) Arranging for professional representation in those civil matters where litigation becomes inevitable. Here the indigent is required to pay only disbursements and out-of-pocket expenses incurred by the practitioner.[11]

The legal profession in Johannesburg has responded willingly and splendidly to the scheme,[12] and all work is done on a voluntary basis; it being understood that the Means Test[13] is applied to every applicant, thereby ensuring that only those persons are helped who cannot afford to obtain legal assistance elsewhere.

The Bureau, when reconstituted in 1940, was placed under the control of a widely-representative Legal Aid Committee, which was a Sub-Committee of the Institute. In October, 1942, however, this Committee became an independent autonomous body, and thus the Bureau ceased to be a department of the Institute. But the final change took place in February, 1943, when the Bureau was formed into an association to be known as "The Legal Aid Bureau of Johannesburg."

The development of Legal Aid for the Poor in the Union as a whole.

Apart from the Incorporated Law Society of the Transvaal, which not only approved the establishment of the Bureau in Johannesburg in 1940 but which has in the succeeding years assisted with not inconsiderable donations, the individual attitude of the Law Societies of the other three Provinces has been one of benevolent neutrality rather than that of active sponsorship. And as regards the national association of the four Provincial Law Societies, neutrality without the benevolence appears to be its policy as the following resolution shows: "That having heard and considered the memorandum submitted . . .

[8] In South Africa official Public Prosecutors are attached to inferior Courts, and are charged with the duty of prosecuting criminal cases on behalf of the King in those Courts. (Act 31, 1917, s. 13 (1).)

[9] This is, of course, in addition to the criminal defence work arising from the cell visiting.

[10] In 1942 more than 90 per cent. of the cases handled never went to court. (R.R. 145/42.)

[11] The Bureau arranges for payment by instalments where the indigent is unable to pay the lump sum immediately.

[12] By 1942 40 barristers and 122 firms of solicitors had been empanelled. (R.R. 114/42, p. 2.) It must be remembered that these are wartime figures.

[13] This Test (which differs according to whether the applicant is a European, a Coloured or an African) was worked out by the Committee in consultation with the Social Welfare Agencies.

this Association resolves that it is not prepared to sponsor such a scheme as outlined nor to identify itself therewith.''[14]

It can thus be seen that in the early stages at any rate the establishment and maintenance of Legal Aid Bureaux was largely a matter of private initiative, and in this connection the invaluable support given by the Institute, and the untiring efforts of the Director of the Johannesburg Bureau to popularize and spread the doctrine of legal aid for the poor, cannot be too strongly stressed.

The success of the Johannesburg Bureau itself soon became known and cases were referred to it from all over the Union. In 1941-2 the Director personally campaigned many centres, addressing interested local bodies and thereby laying a sound foundation for the future " nationalization " of the movement. Early in 1942 a Legal Aid Bureau was opened in Cape Town under the auspices (and run as a department) of the Institute. Although originally confined to criminal cases, it was able in the following year to extend its scope to civil matters as a result of the appointment of a full-time qualified Director, a full-time typist, and two part-time (Legal Aid) members to the staff.[15]

By July, 1942, it had become obvious that legal aid for the poor had made such a wide appeal throughout the country that a concerted drive would probably meet with considerable success. A conference was therefore convened in Johannesburg by the Institute to consider the establishment of a National Legal Aid Organization to be responsible for the development and co-ordination of such work throughout the Union. A large number of delegates representing many organizations, and including the representatives of four Government Departments,[16] approved and adopted, after full discussion, the following motion:—[17]

" A. That this Conference proceeds to elect a Central Legal Aid Committee whose functions shall be:

(*a*) to assist the local Legal Aid organizations in every way possible;

(*b*) to encourage, and to assist in, the formation of Legal Air organizations in areas where they do not now exist;

(*c*) to obtain and administer funds for the development of Legal Aid services throughout the country subject to the condition that the revenue of existing local Legal Aid organizations shall in no way be reduced or jeopardized thereby;

(*d*) to keep the local Legal Aid organizations in touch with each other and with the general development of Legal Aid work, and

(*e*) to prepare the way for the formation of a National Legal Aid Association.

" B. That such Central Committee shall also include:

(*a*) Nominees of the Executive Committee of the Institute of Race Relations;

(*b*) The Secretary for Justice or his nominee;

(*c*) The Secretary for Social Welfare or his nominee;

(*d*) The Secretary for Native Affairs or his nominee;

and shall have power to co-opt representatives of interested organizations."

This Conference gave the movement driving force and direction and thus in 1943 we find the position in the Union to be as follows ; firstly, the Legal Aid Bureau in Johannesburg, an association affiliated to and co-operating with the Central Committee for Legal Aid; secondly, Bureaux at Cape Town and East London, run as departments of the Institute ; and thirdly, legal aid at

[14] June, 1941, at the annual conference of the " Association of the Law Societies of the Union of South Africa."

[15] A.R. 1942-3. pp. 6, 26.

[16] The Departments of Justice; Social Welfare; Labour; Native Affairs. (Note that in S.A. " Native " is synonymous with " African.")

[17] There were but two dissentients. R.R. 145/42, pp. 6-7.

certain other centres carried on under the direction of the Central Committee.[18]

In 1943 the Union Government decided that direct intervention was required, and so the Secretary for Social Welfare, in pursuance of the proposal that his Department should assume financial and administrative responsibility for all legal aid work, stopped the limited grants which had been made since 1941. This aroused a good deal of opposition, and as a result two conferences on the matter convened by the Minister of Social Welfare in May and November, 1943, proved inconclusive and no final decisions were reached.[19]

The Political and Racial background.

Legal aid for the poor is not a subject which can be treated simply *in vacuo*, and hence it is virtually impossible to understand and appreciate the development of this movement in South Africa without some knowledge of conditions existing there.

The total population of the Union—10,521,700—is comprised of 7,250,000 Africans; 2,188,200 Europeans; and 1,082,800 Cape Coloured and Asiatics.[20] Racial discrimination, which takes its most vicious form where the African is concerned, is directed against all Non-Europeans, and therefore 80 per cent. of the total population is affected by it in some way or other.

Thus we find (*a*) that the Non-European is subject to many legal[21] and political[22] disabilities ; (*b*) that he suffers from severe educational handicaps ;[23] (*c*) that little or no provision is made for him in the various social welfare measures;[24] and (*d*) that as a result of the above and many other factors he is

[18] A.R. 1942-3, pp. 6, 25-6.

[19] The writer has had no further information as to subsequent developments.

[20] J. D. Rheinhallt Jones in R.R., vol. XI, no. 1 (1944) at p. 14.

[21] Thus, for example, under the Masters and Servants Act an African commits a *criminal* offence and may be imprisoned if he breaks his contract of employment, unless he gives statutory notice of its termination. Moreover, as a result of the Native Service Contract Act, 1932, " the contract entered into by a native is binding on his children up to the age of 18 years without their consent, and the penal sanctions accordingly become applicable to the whole family." (Lord Hailey, *An African Survey*, p. 663.) " The result of legislation of these two kinds is that the African employee cannot strike without either making himself liable to criminal penalties, or putting himself into a position in which he is legally debarred from obtaining other work." (G. W. Broomfield, *Colour Conflict*, p. 75.) Again, " any African (in the Transvaal and Orange Free State) who cannot produce on demand a receipt to show that he has paid his tax is liable to arrest." (Broomfield, *supra*, p. 45.)

[22] That the possession by the Non-European of the " vote " is nothing more than a farce is shown by John Burger in *The Black Man's Burden*, at p. 115. " The position is thus that, in the highest legislature in the land, 40 Senators represent the European population and four the Native populations, while in the Assembly 150 members represent the Europeans and a number of Asiatics and Coloureds, and three members represent the Natives of the Cape Province. Out of a total of 197 members in Parliament, 190 represent 22 per cent. of the total population, and seven represent 68 per cent.; the remaining 10 per cent. are unrepresented. The 197 members are all Europeans, and, by law, no Non-European is eligible for membership."

[23] For the Non-European child attendance at school is neither compulsory nor, except in the Cape Province, free. " Thus, it may be estimated that roughly one-third of the (African) children of school-going age were actually in school and that the cost of educating these in the past has been roughly one-twelfth of the cost of educating European children." (Dr. O. D. Wollheim in R.R., vol. X., no. 2 (1943) at p. 39.) According to John Burger (*supra*, at p. 171) only one Native child in every 600 receives an education beyond the primary school. The result, of course, is widespread illiteracy, and this taken together with the fact that the African has his own tongue explains why the various Legal Aid Bureaux have had to employ full-time interpreters and typists.

[24] Thus injured Africans are not included in the pension method under the new Workmen's Compensation Act; nor does the Old Age Pension exist for them. And the Unemployment Benefits Act excludes all workers receiving *less* than £78 a year—that is, most African workers. (See further J. D. Rheinallt Jones and R. F. A. Hoernlè, *The Union's Burden of Poverty*, at p. 25: and J. D. Rheinallt Jones in R.R., vol. XI, no. 1, at p. 18.) Note, however, that the Government's recent White Paper *Social Services, their scope and cost* proposes to do much to obviate such injustice.

confined to unskilled and semi-skilled work and in consequence is the lowest wage-earner by far in the country.

From these considerations it is self-evident that to the factor of poverty, which in Europe and the Americas is the sole reason for the provision of legal aid for the poor, there must be added when dealing with South Africa the additional factors of strong racial discrimination, widespread illiteracy, language difficulties,[25] and the fundamental differences between " primitive " tribal customary law and the modern " civilized " legal system.

In conclusion it is the writer's desire to express his strong conviction that it is essential, for the immediate future at any rate, that the Legal Aid movement should not in any way be directly associated with the Government or Provincial or even Municipal administrations; for the Non-European has a well-justified fear and suspicion of and hostility towards officialdom;[26] and this attitude will remain as long as racial discrimination forms part of the official policy.

It is submitted therefore that the South African Government should confine itself merely to financial backing,[27] and leave the movement to spread in the manner in which it has done since 1940.[28]

UNIFORMITY OF LAWS: A SUGGESTION

[*Contributed by* F. H. Lawson, Esq.]

Strict adherence to precedent, often the bugbear of academic lawyers, has given us one priceless benefit, that of uniformity. This uniformity does not exist merely in the realm of time, ensuring that the decision of a case shall be predictable within a single jurisdiction; it also exists to a remarkable degree in the realm of space, so that, within certain limits, a question of common law will receive the same answer whatever the jurisdiction in which it arises. Within the British Empire there is the immense unifying instrument of the Privy Council and occasionally we are reminded, as for instance recently by Professor Willis,[1] of conventions by which Canadian and Australian courts[2] ease the task of the consultant by following as a matter of course, though not of legal obligation, the decisions of the English Court of Appeal or even single judges in the High Court. It is hardly too much to say that within the Empire the common law is one. Qualifications must be made when we pass to the United States, where the mass of local authority has long been so thick that there is no need to have recourse to decisions in other jurisdictions, at any rate in the older States. Yet even the lack of any central Court of Appeal for matters outside the competence of the federal courts, even the settled doctrine of those same federal courts that there is no common law of the United States, even the growing tendency to depart from any strict adherence to precedent have not caused the common law to diverge very greatly among the several States, or indeed from that which prevails in the English law countries of the British Empire. This uniformity of common law has made codification a much less

[25] English and Afrikaans are alien languages to the African.

[26] A succinct illustration of this was the adverse reaction of the Non-European " clientele " of the Johannesburg Bureau when it moved in 1941 into a suite of rooms in the Magistrates' Courts; for the Bureau, although well established by this time, was immediately identified with the Police and the Criminal Courts.

[27] This introduces the thorny question of finance. It is obvious from what has already been said that the Legal Aid Bureaux are expensive to run. Thus, for instance, the Johannesburg Bureau costs approximately £1,000 per annum. The sources of income for the different Bureaux are: (*a*) limited Government grants, in the case of the Johannesburg, Cape Town and East London Bureaux (but stopped in 1943); (*b*) the Institute, in those cases (now only Cape Town and East London) where the Bureau is a department thereof; and (*c*) private donations.

[28] *Cf.* Cohn (*supra*) at p. 256.

[1] Securing Uniformity of Law in a Federal System—Canada. *University of Toronto Law Journal*, 1944, p. 358.

[2] See note by Mr. Cowen in L.Q.R., October, 1944.

urgent question than in countries of the civil law; for codification, though it has also roots in the desire for elegance and accessibility to the public, springs mainly from the need for uniformity.

But precedent has its seamy side, and in the long run, though indirectly, may ruin uniformity. Lawyers like to think of what they call lawyers' law as being essentially common law or equity. Private law, they assume, should in the nature of things be free from interference by the legislature. It should arise naturally from the rational treatment of disputed claims, without any admixture of policy. It should be unwritten in the sense that the words in which it is inevitably expressed should be mere descriptive indications of its contents, and should not usually aspire to the condition of a formula or a definition. But mistakes are bound to occur, and in any case unwritten law gets out of date in course of time, and then the very doctrine of *stare decisis* makes the legislature the only instrument capable of effecting a thorough overhaul. Even judges like Cardozo, who were not too closely wedded to the doctrine, would have had to subscribe to the distinction drawn by Chief Justice Rose Innes between changes which can be made in the law by judges and changes which must be left to the legislature.[3]

Lawyers have long since been resigned to the intrusion of the legislature in real property law. They have indeed been able to console themselves with the reflection that for the most part they themselves have drafted the amendments to that most technical body of law. What is not always recognized is that we have three-fourths of a commercial code, scattered indeed over a number of isolated statutes, but none the less in existence and working order. What is perhaps more significant, even the hard core of contracts and torts, still predominantly common law, has been and doubtless will be tampered with by the legislature; and no one can say for certain that the movement for codification will not revive. Lawyers' law contains a very great deal of legislation and is likely to contain more; for nowadays, whatever may have been the case with Quia Emptores or De Donis, once a tract of law has passed under the legislative harrow, it ceases forthwith to be common law without any possibility of return.

It takes very little formal pressure to ensure a very considerable degree of uniformity in common law. But unless positive action is taken to keep legislation uniform, it naturally springs apart. Legislatures prize their autonomy, and they exercise it by doing something different. And in this connection it must be noted that the English-speaking world is conspicuous for the immense number of its legislatures, and for the tendency, even where there are federations, to leave private law within the competence of the local legislature. There are in all well over a hundred legislatures competent to modify lawyers' law, fairly evenly divided between the British Empire and the United States.

This is all very artificial and vexatious. The Roman jurists, if they did not express themselves very happily, knew perfectly well that any community ought to have running within it a uniform law, but that an individual can belong to more than one community, according as he is a citizen of some narrow city state or a citizen of the world. They knew also that the trader is a citizen of the world. The family man or the user of land can be governed by his own local law without any serious disadvantage to himself or others, but widespread commerce demands a uniform commercial law. Down to the middle of the eighteenth century the western world held fast to this truth. The law merchant was remarkably uniform. Then there came a change. Trade

[3] "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature." *Blower* v. *Van Noorden* (1909) T.S. 890 at p. 905.

and industry became increasingly complicated, and in consequence the law itself became too complicated to be left in an indeterminate customary form. Lord Mansfield made it a matter of precedent, the Continent codified it. Both processes inevitably nationalized it and the international community of traders gradually drifted apart.

One example will be enough to show how great the divergence became. The English law of Sale of Goods has notoriously been greatly influenced by the Roman law, and it might therefore have been expected that the law of sale would everywhere be much the same. In fact there is nothing even approaching a general law of sale. Professor Gutteridge, in his paper on a Code of the Law of Sale,[4] points out that one must always take account of four families of Western law, the Anglo-American, the Romance or Latin, the Germanic and the Scandinavian; and not only do the four families differ widely on this topic, but there are marked differences even within each family. Of course, there is this much to be said in reply: very few of the rules in sale of goods are compulsory, and so under whatever law the parties contract, they can by taking the appropriate steps attain the end they desire. Indeed, if they manage to anticipate all possible contingencies and provide against them by express terms, it will hardly matter under what law they contract or even in what court they sue. Thus the great bulk sales tended to take place not according to this or that national law but under the rules drawn up by some great produce exchange and incorporated by reference in the contracts; and as a wholly disproportionate amount of international trade passed through London, bulk sales tended to take place in accordance with English ideas.

However, not all problems can be settled by act of parties. In particular, questions of property vis-à-vis third parties, a special form of which is negotiability, have to be settled by operation of law. It is not therefore at all surprising that the need for uniformity on such topics should be acutely felt, or that the law of negotiable instruments has been unified to a remarkable degree.

Legislative reform has not indeed broken the uniformity of Anglo-American law to anything like the extent that might have been feared. Unifying influences have been constantly at work. Let us confine our attention to three.

1. The Colonial Office prepares model laws for adoption by the local colonial legislatures. Generally speaking, it is understood that the regular procedure is to look at legislation made by Parliament for the United Kingdom and to see how far it is appropriate to the conditions of particular colonies or dependencies. A model law is then drafted which is transmitted to the law officer in each locality. The laws relating to labour show how wide can be the variations even upon the same model. There may be, however, a gradual decline in this unifying force. Colonies and dependencies will wish to take the initiative instead of adopting the models of the Colonial Office, and the tendency will be all the greater if there is federation among dependencies such as the West Indian Colonies or the Colonies and Protectorates of West Africa.

2. The foregoing method shades off into a second method, that of voluntary adoption. There has always been a great deal of imitation by lawmakers. At its most extreme, we speak of " reception "; and it is a remarkable and too little known fact that more people in the world live under received foreign law than under laws indigenous to their own countries. Now when a country has received the law of another country, it tends to look at amendments introduced into the law by the legislature of that other country. There is at least the probability that if those amendments are imitated they will fit, and there is a further probability that they will be needed wherever the main body of the law prevails. On the whole the major Acts of private law legislation—except the most recent Acts relating to Real Property—which have been passed by the United Kingdom Parliament, have been adopted in the Dominions and self-

[4] *British Yearbook of International Law*, 1934.

governing Colonies. This is not at all surprising. What is surprising is that so little dominion or colonial legislation has been adopted or imitated here. The Sale of Goods Act, enacted by the Imperial Parliament, has been adopted in all the English law jurisdictions of the Empire. It is only after a long and slow journey via the Prairie Provinces of Canada that the New Zealand Family Inheritance Act has made its way to the Mother Country. One would expect the old law to be tried out and found wanting on the frontiers of settlement, and the discoveries of the frontier laboratories to be made available in the United Kingdom. On the whole that is not the way things happen, either here or for that matter in the United States. The most progressive and experimental States have often been the oldest. Certainly New York State has long been a leader. But, generally speaking, the States have not looked to Westminster for model legislation since they achieved independence. They have often tended to act in groups. An Act passed in one of the States of the group will be taken up by others in the group. Thus the five great States of the nearer Middle West, Ohio, Michigan, Indiana, Illinois and Wisconsin, tend to go together, so that in the end there is less variety than might be expected from the diversity of legislatures.

This instrument of unification still works, though it was probably most active before the rise of Dominion nationalism. Still, some of the Acts passed on the recommendation of the English Law Revision Committee have been widely adopted, e.g., in some of the Canadian Provinces; and there is no doubt that the successive revisions of English Company Law have had great influence, even, it may be noted, outside the English-speaking world.

However, imitation or wholesale adoption has one great disadvantage: the adopting jurisdiction contributes nothing. This may have two effects, for not only does the drafting country get no outside assistance, but the adopting country may adopt something that is not perfectly appropriate to its conditions.

Pausing here for a moment, it would be a useful, if humble, piece of work to trace the fortunes overseas of the great legislative monuments of English law. No doubt one would have to start by analysing the contents of the Statute Book and discarding the enactments of temporary or local importance and those which are too closely bound up with specifically English arrangements of government and administration to claim universal significance. It would probably be found that the greater part of such legislation as is included in the term Lawyers' Law has encompassed the English-speaking world, always excepting the most modern developments in the law of land.

3. The third way of ensuring uniform legislation seems to have the most illustrious future, and for that reason and also because it is not very well known in this country, I propose to devote the rest of this article to it.

Co-operation between persons of different jurisdictions in the proposing or making of laws goes back a few generations. Some of its fruits are permanent acquisitions, such as the Berne Copyright Convention and, on a contractual plane, the York-Antwerp Rules. The International Law Association has been a body of great influence and achievement. Then again the International Labour Organization has presented to the world a large number of conventions which have recently been collected under the title "The International Labour Code." Many of these conventions have been widely accepted and are likely to be even more influential in the future. But much of this international work has resulted in broad statements of principle or policy rather than what English or American lawyers would consider actually working legislation; and very little of it has had anything to do with lawyers' law. It would indeed have been difficult to achieve international agreement on matters where there were at least two traditional disciplines, of the civil and common law respectively; and although one may welcome the appearance of distinguished foreign lawyers as witnesses before departmental committees such as that on the Companies Act,

one knows instinctively that to look for successful drafting of laws from a fully international conference is like ploughing the sands.

However, experience seems to show that if men of different jurisdictions work within the confines of a single family of laws they can do much to secure three closely related ends, to reform, to codify and at the same time to unify the law. Indeed all the great original codes have been made for countries where the multiplicity of local laws had become a nuisance. It may well be doubted whether the Code Napoleon would ever have seen the light of day but for the welter of provincial and local customs that divided France between them. But there is a distinct advance when countries which are not subject to the same legislature decide to unify their laws. The joint legislative activity of the Scandinavian countries in the present century was a remarkable feat, little known to English lawyers, but deserving of study.

If we look beyond the Atlantic we shall find something much more impressive and worthy of close investigation, not merely from an academic but also from a practical point of view. Both the United States and Canada have considerable bodies of Uniform Laws that should be much better known to us than they are at present. There is indeed reason to believe that there is only the most fragmentary knowledge of their existence in this country.[5]

The Constitution of the United States empowers Congress to pass private law legislation only within a restricted sphere, and even within that sphere Congress has been very chary of exercising its powers. Congress has power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is therefore competent, where a transaction involves the transport of goods from one State to another, to exclude from that transaction the law of either of those States or of any other State, and to enact that the transaction shall be exclusively governed by rules laid down by Congress itself. Something like that has in fact been done so far as the regulation of railways is concerned, and this regulation has extended to the passing of Acts relating to Bills of Lading, which, in the United States, are used for shipments whether by sea or by rail; but Congress has not interfered in matters of pure private law, such as the sale of goods or negotiable instruments. In such matters State law prevails, and if there is any doubt which State law governs a case, the rules of Private International Law must be applied.

It is evident that even if Congress had laid down rules of private law to govern interstate commerce, interstate commerce would still have been governed by the law of the particular State in which it took place; and accordingly Congress would merely have added another to the bodies of law already existing within the several States. There is no method known to the Constitution, as it now stands, by which uniformity of law can be imposed on the States and the Nation. It was therefore necessary to proceed by consultation and agreement.

The American Bar Association as far back as 1890 suggested that each State should appoint commissioners for the purpose of drafting and recommending the enactment of uniform laws. The National Conference of Commissioners on Uniform State Laws, to give it its full title, first met in 1892, and gradually all the States came into the movement. The Governor of each State now appoints three Commissioners. For many years past the conference has met every year in one of the great cities of the United States, during the week preceding the meeting of the American Bar Association.

That Conference is divided into seven sections or committees, dealing respectively with

I Commercial Law; II Property; III Public Laws; IV Social Welfare; V Corporations; VI Torts and Criminal Law; VII Civil Procedure.

A Committee, if it considers that a uniform law is called for on a particular topic, employs a draftsman, who may or may not be a Commissioner, to draft

[5] on the whole subject *see* S. Williston, *Life and Law*, Chapter XIV.

an Act, discusses and if necessary modifies his draft, and eventually submits it to the full Conference, which, after further discussion, approves a form of legislation which it recommends to the various States. The discussion may take as long as four years at different levels.

There is, of course, no guarantee that a uniform law will be universally or even widely accepted. It rests with the several Commissioners to introduce it to their State legislatures. If a Commissioner actively disapproves of a draft, or even if he is only lukewarm about it, the chances of adoption by his legislature are correspondingly diminished. Many uniform laws proposed by the Conference have noticeably failed of wide success, some have hitherto had no success at all.

How are we to measure the success of such an undertaking? Some would say that if a uniform law is not adopted by every jurisdiction it is a failure; many, whilst not taking up so extreme an attitude, would require at least a majority. But if it is unfortunate that a uniform law, which has emerged from the fire of prolonged criticism, should not meet with universal and rapid acceptance, the draft always remains there, available for adoption at any time. It is not like an Amendment to the Federal Constitution, which lapses unless ratified by a sufficient majority within a reasonable time. Adoption by one State need not be made conditional on adoption by all or any of the rest. No doubt the term uniform law is rather a misnomer for a law which is in force in only two or four or six States out of forty-eight, but the law may become a true uniform law by subsequent adoptions. Some adoptions came astonishingly late, perhaps owing to some sudden but tardy change of feeling in a State. Thus as late as 1941 States were adopting for the first time the Uniform Sales Act and the Uniform Warehouse Receipts Act, both of which were recommended in 1906 and had been extensively adopted within a few years of their recommendation.

Moreover, uniformity is not the only end aimed at by the Conference. It is not unlikely that the first Commissioners were moved by the codifying impulse which the world of commercial law had felt in England a short time before. It is significant that the first uniform law was a Negotiable Instruments Act. Undoubtedly the greatest successes of the movement have been in commercial law; the United States now has at least the beginnings of a Commercial Code.

A third incentive has been the more ordinary need to reform doctrines that have gone wrong or become out of date. If only one jurisdiction adopts a law which is essentially of a reforming character, the work of the Commissioners is justified, though disappointing. Thus the Uniform Written Obligations Act provides an informal and rational method of making a gratuitous promise or release binding without the use of a seal. It enacts that a written promise or release shall not be void for lack of consideration if it also contains a statement, in whatever words, that the maker intends to be bound by it. It comes as a surprise to learn that only Pennsylvania and Utah have so far adopted it, that Massachusetts, for instance, still makes a gratuitous promisor use a seal, and that New York, along with the greater number of other States, makes him exact a dollar consideration. But Professor Williston, who drafted the law, remains unrepentant, as he may well be. The position is indeed not quite so bad as it sounds, for some States already presumed consideration in a written agreement. But the main point remains: an improvement may still be an improvement even if it is not universally adopted.

Again, if a uniform law relating to commerce has received wide currency among the States that are commercially important, it is of little consequence that other States have rejected it. As Professor Williston says:

> "If a number of adjoining States enact the laws recommended by the Conference of Commissioners, they provide themselves with rules which will cover uniformly most cases that arise. The fact that a few jurisdictions

> do not pass the law will have little effect outside of those States. Business cannot migrate to them for the purposes of avoiding the application of the uniform law. It is, therefore, no argument against the passage of the uniform laws that it is very difficult and sometimes impossible to secure their passage in every State."[6]

But indeed it will be obvious to anyone who examines the lists of uniform acts and the States adopting them that the Commissioners rarely expect wholesale adoption of more than a few of the most important laws. They are evidently concerned to provide reforming or codifying statutes for whoever chooses to adopt them.

Judging by these criteria, there can be little doubt that the efforts of the Conference have met with great success. One law, the Uniform Negotiable Instruments Act, modelled on our Bills of Exchange Act and recommended in 1896, has been adopted by every State; the Uniform Warehouse Receipts Act of 1906 has failed of adoption in only two jurisdictions; and the Uniform Sales Act, also of 1906, which follows pretty closely our Sale of Goods Act, has been adopted by most of the States which are of commercial importance. The Uniform Bills of Lading, Partnership, Limited Partnership and Stock Transfer Acts have likewise won a considerable amount of acceptance. Altogether, down to about 1937, 68 Uniform Laws had been recommended and there had been 704 adoptions, 341 of which were adoptions of 11 Uniform Laws. These numbers are now much higher. It seems that the movement has a centre in the north-eastern States of the Union, and especially in the great commercial and industrial States of Massachusetts, New York, New Jersey, Pennsylvania, Maryland, Michigan, Indiana, Illinois and Wisconsin. In addition some of the States of the Far West and the Pacific Coast have adopted many of the Uniform laws. The most standoffish section of the country has been the conservative and often lethargic South. It must be admitted that different uniform laws seem to have a special appeal to different groups of States.

There have, it is true, been some objections to the movement for uniform State laws; it has even been called a craze. Some point to the possibility, which has sometimes been translated into actuality, that the State courts will give different interpretations of the same provisions; and, as has already been remarked, there is no central court with jurisdiction to unify interpretation; none could be set up without a constitutional amendment, a most unlikely event. Of course the common law of the States has diverged for the same reason, so why the attack on uniform laws? The explanation often given is that words are less certain guides to meaning than cases, which seems doubtful. Is not the objection then to be traced back to the uneasiness with which judges trained in a tradition of case-law approach legislative enactments?

In any case, there are two answers. The first is that all but the earliest of the Uniform Laws contain a clause providing that the law "shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those States which enact it" and not to maintain continuity with pre-existing State tradition. This clause should ensure with reasonable certainty that if the Courts of one State interpret a provision in one way, they will be followed by the Courts of other States, unless the interpretation seems patently wrong. The second answer is to be found in the changing attitude of American Courts towards precedent. If the Courts of a State find their interpretation of a clause out of accord with that prevailing over the greater part of the country, they are now at liberty to revise their own interpretation in the interests of uniformity.

At all events, Professor Williston, who drafted some of the most successful uniform laws, appears to be still convinced of the usefulness of the Conference, and his experience has lain for the most part in contract, the general part of

[6] *Life and Law*, p. 219.

which is almost entirely based on common law. Professor Llewellyn of Columbia, who does not always see eye to eye with him, asserts roundly the merits and essential uniformity of the Negotiable Instruments Law, which has come in for much criticism.

The movement in Canada is much younger and the achievement less spectacular. The Canadian Commissioners first met in 1918 and the first of their uniform laws appeared in 1920. Only 25 laws had been recommended down to 1943 and of these only 13 had been adopted by five or more provinces. There had been 118 adoptions in all.[7] This may seem a poor harvest, especially when we consider that there are only eight English law provinces (Quebec with its French Code hardly comes into the picture) as against the forty-eight States, and the chances of agreement should have been more favourable. But the field of possible legislation was not so great, nor the need. Adoption of the Partnership Act and the Sale of Goods Act had already given the Provinces uniform law where the need for it was most urgent, and it must be remembered that in the Prairie Provinces at least virtually the whole of English law as it stood in 1870 was in force, both common law and statute. We may take it as reasonably certain that if a particular American Uniform law finds no counterpart in the corresponding Canadian list, it is not because the Canadians have not been enterprising enough to tackle the problem, but because there was already in existence a uniform law derived from England. Further, the division of functions between the Provinces and the Dominion differs from that between the States and the Union. Power to legislate concerning property and civil rights in the Provinces is expressly reserved to Provincial legislatures, but the Dominion Parliament has exclusive competence in Criminal Law—it has enacted a Criminal Code—and in relation to bills of exchange and promissory notes. Banking is a Dominion subject and so also is the incorporation of companies which do business in more than one Province. The Commissioners have had more scope in Insurance Law, and here they have been remarkably successful, even more successful than their American brethren. The other widely adopted uniform laws relate to Assignment of Book Debts, Bulk Sales, Commorientes, Contributory Negligence (introducing the civil law principles of sharing the damage), Intestate succession, Legitimation, Reciprocal Enforcement of Judgments, and Warehousemen's Lien.

"At present," says Professor Willis, "the conference has run out of the wholly non-controversial material in which it has met with its greatest success and has before it a few measures of mild law reform, viz., evidence, interpretation, central registration of liens on motor vehicles, the right of the owner of a chattel after it has been affixed to land." But it may be that it might do more if we and other parts of the Commonwealth of Nations were ready to co-operate.[8]

For the uniform laws movement has lessons for us. Not only is the task of reforming private law unnecessarily difficult in England, but it is too often carried out in almost complete ignorance of what is going on elsewhere. One can doubtless point to an improvement in recent years. The Law Revision Committee has on it at least one accomplished comparative lawyer in Professor Gutteridge and another of its members, Professor Goodhart, is both an American citizen and well-versed in American Law. Some of the Committee's reports show the effects of acquaintance with foreign law, though one must also admit that the two in which this knowledge is most apparent are the two that have failed to pass into law.

This ultra-nationalism was not characteristic of what Pollock called "the classical period of the common law," the years between the Common Law Procedure Act and the Judicature Act. Blackburn and Willes, its two greatest

[7] There is a list in the Minutes of Proceedings of the Twenty-sixth Annual Meeting of the Canadian Bar Association, Ottawa, 1944, p. 278.

[8] *University of Toronto Law Journal*, 1944, p. 365.

ornaments, were extremely widely read in foreign law, and were not above using Roman law or the writings of Pothier when English authority was lacking. Even at a later date, I am informed that Sir Mackenzie Chalmers used American decisions to fill in gaps in his codes.

Moreover, it is lawyers' law that is both most insular and most unprogressive. In such departments as education and social security and even in land registration, we have applied with great effect the experience of foreign administrators, and we have not found it difficult to give an English turn to what we have adopted. But the nearer all these things come to pure private law the harder the task of the reformer becomes. One of the chief reasons for this seems to be the marked breach that exists between lawyers and the rest of the nation, and in particular between lawyers and the government departments. There has always been a tendency for English lawyers to erect themselves into a sort of priesthood and to guard jealously the arcana of lawyers' law. But it is not easy in the modern world to carry through great reforms without the aid of full-time professional workers, and those workers must somehow or other be close to government. The most valuable of all instruments is a government department in the hands of an able and enthusiastic minister. It is a most enlightening symptom that the legal profession as a whole is strongly opposed to the idea of a Ministry of Justice; it is no less true that until there is a Ministry of Justice we are hardly likely, except by accident, to find a first-class political leader to carry through an extensive reform of private law. A Lord Chancellor is usually too busy with other things to do more than sponsor isolated reforms. Broughams and Birkenheads come at rare intervals, and even they are not to be compared with the steady pressure of a great Department. I do not believe much in the explanation that there are no votes in the reform of lawyers' law. It would have been contrary to nature for Birkenhead not to have left a very broad mark on the Statute Book. But for the fact that the ground was not sufficiently prepared and for the bad luck of the war of 1914, it might well have been another great politician and statesman, Haldane, who would have had the credit.

However, the lawyer's instinct to fight shy of a Ministry of Justice is probably sound. The less the practice of the law has to do with " policy " the better. On the other hand a government department without a policy is a soulless machine. Now the public, I think, draws a fairly clear line between government, which may crystallize its policies in the form of laws, but is really managing public services along lines which may be highly controversial, and, on the other hand, private law, which is thought to be capable of ultimate resolution into uncontroversial questions of simple right and wrong. Private law is regarded as impersonal in a sense in which public law can never be impersonal.

What has this got to do with uniform laws? We may start with a simple suggestion. Since Lord Sankey's beneficent innovation we have had a regular body of lawyers of every kind ready at hand to examine any misfit of legal doctrine which the Lord Chancellor of the day thinks fit to ask them to report on. The Law Revision Committee has done valuable work and will not, it is to be hoped, be discouraged by the failure of its most ambitious efforts to win acceptance in high quarters. But it has no initiative. I am unwilling to make too much of that defect in its constitution, for it would be a very obscurantist Lord Chancellor who would not be ready to accept reasonable suggestions from members of the Committee. Yet it is bound to have less influence than a body that has initiative and independence and regular meetings. Moreover, in the nature of things, the task of the Committee is to peck at lawyers' law. It must assume that the law is generally sound, but occasionally goes wrong. Out of such an attitude it is almost impossible to frame a programme; indeed anything like internal coherence must inevitably be absent from any programme that could be adopted. The Committee cannot even start, as did the Uniform

Laws Commissioners in America, with the desire to frame a uniform Commercial Code. Too much of that has already been done in this country.

But the Committee could have a fairly long-term programme if it aimed not merely at law reform but at the attainment of uniformity. The whole body of English statutes of private law content is not very large, and if we leave out the most modern real property statutes, which do not travel easily, or such technical branches as patent law, which are not really lawyers' law, is actually small in compass. It would not be a great task to try to co-ordinate this body of legislation and to consider how far it might profitably be brought into line with corresponding legislation in other countries of English law. The first step would be to look at the laws of those countries which have already moved some distance along the road towards uniform law, i.e., the United States and Canada. The uniform laws of the United States would of course afford the widest field of inquiry, and not less so because some of the Canadian laws have been based on Acts passed at Westminster.

I suggest then that the Law Revision Committee should look through the Canadian and American uniform laws and consider at what points it might be advantageous to amend our own law to correspond with them. I am inclined to think that it would be most profitable to begin with statutes, such as the American Uniform Warehouse Receipts Act, which have no counterpart in this country. There would at least be no danger of breaking through an existing uniformity of statute law within the Empire. We might find useful ideas which have been tried out in an environment not unlike our own, and we might also bring some order into unsatisfactory corners of our own law. Thus an examination of the Act just mentioned would surely draw attention to the defects of our law relating to documents of title to goods.

But the Committee would soon find itself faced with the task of examining uniform laws which were modelled on our own codifying Acts, in particular the Uniform Negotiable Instruments Law and the Uniform Sales Law. The assimilation of our own Bills of Exchange Act to the former would not be too easy. It is not very important that the American Act deals with negotiable instruments generically, whereas ours leaves the rules dealing with bills of exchange to be applied by analogy to other negotiable instruments. But there are differences of banking practice which might not be got rid of easily, and America does not know the crossed cheque. Assimilation of our Sale of Goods Act to the Uniform Sales Law would be a much easier task. It is no criticism of Chalmers's admirable work to say that Professor Williston's is better. The American Act was finally approved by the Uniform Laws Commissioners in 1906, thirteen years after the passing of the Sale of Goods Act. It would have been surprising if Professor Williston had not improved on his original. At almost every point where the two Acts differ the Uniform Sales Act gives a simpler and more practical solution. It is also on record that Arthur Cohen, K.C., declared himself satisfied that the Uniform Negotiable Instruments Act was superior to its prototype.[9]

If the Committee found a *prima facie* case for amending our great codifying Acts, it would at once be faced with the danger of breaking such uniformity as now exists within the Empire; and this suggests a further step. Should we not try at once to establish a uniform laws conference for the British Empire? The natural nucleus would be the Canadian Commissioners, if they would consent to act as such. They have over twenty years' experience of making uniform laws; all we have done is to make laws which other countries may take or leave as they like. Moreover, the Canadian Commissioners are likely to have the most intimate knowledge of American conditions and the working of the

[9] From letters quoted by L. D. Breuster in "The Negotiable Instruments Law" in a rejoinder to Dean Ames in 15 *Harvard Law Review* at pp. 27, 39.

American laws, a matter of considerable importance if we wished to consider the possibility of adopting American uniform laws soon after they are made.

We might also find that the Canadian Commissioners would provide useful liaison with the American Commissioners; for although there could be no constitutional objection to admitting British representatives to what is only a voluntary organization, I do not think the time is at all ripe, if it ever will be, for us to seek membership of the American Conference. But informal intercourse between draftsmen or at the committee stage is by no means excluded.

The most ardent Dominion nationalist could not with any show of reason raise the bogey of imperialism or even of imperial federation; for it is of the essence of a uniform laws conference that it is composed of equals and can do nothing to enforce acceptance of its recommendations. However disappointing this inability may sometimes appear to be, it has its advantages. Again, the very freedom of member states to reject the commissioners' recommendations would make it worth the while of the parts of the Empire where English law does not in general prevail to attend the conference. There are few parts of the Empire where English law has not got some foothold. Almost invariably criminal law is of English origin and generally the mass of commercial law also. One can well imagine that Scotland and South Africa might wish to have some say in the drafting of uniform laws on such topics as these, and might even accept innovations in the more jealously guarded civil law. Certainly the conference would be poorer for the absence of representatives from Scotland and South Africa.

What does English law, in the narrow sense of the term, stand to gain from all this? Apart from the possibilities of fertilization from outside and the general benefits of a breach in our insularity, I think the cause of law reform would gain immensely from having a permanent body behind it, with all the prestige of imperial connection. For curiously enough, although we instinctively react against proposals to contaminate our law with foreign elements, we rather like to give way to suggestions from the Dominions, if only we hear of them. On the other hand, the American experience seems to discountenance any suggestion that a Uniform laws movement puts a brake on reform by anyone of the member States. Secondly, we might get, what seems to be past hoping for in England—or, for that matter, in Scotland—a lawyers' Parliament. At present we have nobody to express what lawyers feel in relation to law reform—perhaps because as a whole they have no feelings of the kind. Certainly neither the Bar Council nor the Law Society takes anything like the same interest in law reform as the American Bar Association or the Bar Associations of the various States. The Dominions, too, have their Bar Associations no less active than those of the United States. Perhaps it is too early to say what the Law Revision Committee may develop into, but it is certainly not representative. It has the merits and defects of a body of experts, together with, perhaps, a slightly academic flavour which the Uniform Laws Commissioners of the United States and Canada seem to have escaped, in spite of the influence of the great law schools on the former.

The absence of any English or Scottish body remotely resembling the American Bar Association does, however, make it difficult to see where proposals could originate for an Imperial Conference of Uniform Laws Commissioners. Perhaps the Canadian Commissioners might be induced to take the lead and invite representatives from the other parts of the Empire to join them. Our representatives might then properly be chosen from the Law Revision Committee, or Parliament might prefer to do the choosing itself. I doubt whether an unrepresentative body like the Law Revision Committee could issue the invitations itself. But perhaps no body is better fitted to start the ball rolling than the Society of Comparative Legislation, with its long standing connection with all parts of the Empire. Is it too much to hope that it might at length

pass beyond its present function of clearing house and publisher to the more active one of propagandist or perhaps even draftsman. Although it has its habitat in London, a society which has for President the High Commissioner for Australia and for Chairman a Scottish Law Lord is assuredly no purely English body and has a better claim than any other organ to speak for all the lawyers of the Empire.

RECOGNITION OF FOREIGN FORMS OF STATUS[1]

[*Contributed by* R. H. Graveson, Esq., Ph.D., S.J.D., LL.M.]

England is an island of Common Law in a Continent of Civil Codes. The broad difference in her legal institutions from those of her neighbours is well illustrated in matters of status, several forms of which, existing on the Continent, have no counterpart in English law. Examples are prodigality, infamy and civil death,[2] legal conditions on which England possesses no appropriate body of law. The attitude consistently, if often unconsciously, adopted by our courts has been to refuse all effect to the incidents of such un-English status so far, but only so far, as concerned acts done in England. It is incorrect to speak of an English Court's refusal to recognize a foreign status, though the Court of Appeal recently gave justification for so speaking.[3] For England, it has been well said, " is not the arbiter of the wisdom of foreign customs, and her Courts would scarcely increase the esteem in which they are now held if they were to stigmatize a foreign institution as unworthy of recognition merely because it formed no part of English law."[4] It is in questions of the recognition of alien types of status that the principle of universality is put to its hardest test. That principle, together with its broad limitations, was enunciated at an early date by Mr. Justice Littledale in the words, " The very rule that a personal status accompanies a man everywhere, is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced."[5] To the same effect is the well-known judgment of Ware, District Judge, in *Polydore* v. *Prince,* decided in 1837.[6] The result of case law in both England and America is that acceptance of the principle of recognition of status does not of itself imply that all the incidents of that status will be recognized: the scope of such incidents will, in fact, be limited to conformity with those of the local law under which it is sought to exercise them. No English court could tolerate the manifest injustice of a foreigner seeking to evade contractual obligations incurred in England on the ground of an incapacity to contract imposed by the law of his domicil; for the first duty of the court " is to fulfil as far as may be the reasonable and *bona fide* expectations of its own domiciliaries."[7] In American law a foreign status will be recognized in so far as it affects rights arising in a foreign state which gave effect to the status, although, according to the American Law Institute's interpretation of United States doctrine, " If a status is created by the law of one state which is not regarded as a status by the law of another state, no effect will be given to the status as such in the second state."[8] This limitation of the incidents of status is a different matter from refusal by all means to recognize the status itself. Despite

[1] Extract from unpublished thesis " Status in the Common Law " (1941).
[2] Story, *Conflict of Laws,* s. 104.
[3] Re Luck (1940). 1 *All E.R.* 375; 3 *All E.R.* 307 (C.A.).
[4] Cheshire, *Private International Law.* (1935), 79-80.
[5] *Birtwhistle* v. *Vardill,* 5 B. & C. 438, at p. 455.
[6] Ware, 402 (1837).
[7] Allen, *Legal Duties and other Essays,* p. 55.
[8] Restatement; *Conflict of Laws,* para. 120 and comment (c); Beale, *Conflict of Laws,* p. 651.

judicial *dicta* largely proceeding from a failure to discriminate between recognition of a foreign status and giving effect to its incidents, it is very doubtful whether English law presents a single instance of refusal to recognize absolutely the existence of a status validly acquired under some other law. The situation could only arise in the case of a status so entirely opposed to Common Law ideas of public policy, natural justice or morality that the mere recognition of its existence would be an abandonment of basic principles of the law. Within this class of unrecognized status are said to fall the cases of slavery and penal or privative conditions which have no counterpart in the Common Law. But even the slavery cases in England and the United States[9] stopped short of denying absolutely the existence of the servile status in the State which imposed it, and were limited to a denial of any legal effect to it in the jurisdiction in which the question was being adjudicated. The same limitations apply to the status of adjudicated prodigal which arises in Continental law, when that status comes for consideration before an English court.[10] While courts of the United States follow the English rule in this particular status,[11] the attitude of Continental courts shows a consistent recognition of the condition of prodigality imposed by other jurisdictions,[12] and an equally consistent refusal to impose the status upon a person whose personal law, *i.e.*, his nationality, according to French law, refuses effectively to recognize the status.[13] A more apparently absolute exception to this general principle of the universatility of status is revealed in Sir Gorell Barnes' judgment in *Chetti* v. *Chetti*[14] upon the status of a Hindu, for of the legal condition involved he said, " . . . there seems to be no status, of which notice can be taken in this country, creating an incapacity to enter into a marriage contract in this country,"[15] though an equally valid, and legally more acceptable, interpretation of the case is the fact that for the purposes of the matter adjudicated no special status whatever had been created, so that no question of recognition properly arose. To refuse recognition to foreign status of a religious nature, such as the civil death imposed upon members of certain orders, has been the apparent and declared policy of English law since the time of the Reformation,[16] and this appears to be a clear instance of the rare case of absolute non-recognition of a status validly acquired under its proper law. Even in cases of this type of status, however, it can now be confidently assumed that an English court, while refusing to give effect to a foreign religious status so far as concerned acts done in England, would not refuse to recognize the validity of the consequences resulting in the country whose law imposed the status, such as the coming into operation of the will of a person joining a religious order. The point may well arise if an English court is ever asked to determine the title to property acquired abroad under a will operating in consequence of religious and civil death, and one has little doubt that the court would give effect to rights thereby validly acquired under a foreign law.

Where a status is imposed as a consequence of criminal conviction, no effect is given to it beyond the limits of the State which imposes it. The principle of the universatility of status here comes into conflict with that of the territorial nature of criminal law, and in this conflict the latter principle prevails. Two American cases illustrate the point. In *Commonwealth* v. *Green*[17] the prisoner had been convicted in New York State of murder, one

[9] *Somerset* v. *Stewart* (1772), Lofft, 1: *Polydore* v. *Prince*, Ware, 402. *See also* Story, *Conflict of Laws* (2nd ed.), para. 96, p. 144 *et seq.*

[10] *Worms* v. *Valdor* (1880) 49 L.J. (N.S.) Ch. 261; Re *Selot's Trusts* (1902) 1 Ch. 488.

[11] *Gates* v. *Bingham*, 49 Conn. 275 (1881).

[12] *Fay* v. *Oppenheim* (1889) 17 Clunet, 810, I Beale's Cases, 762.

[13] *Cumming* v. *Cumming* (1895) 23 Clunet, 147, I Beale's Cases, 764.

[14] (1909) P. 67.

[15] *Id.*, at p. 78.

[16] " Of foreign professions the common law taketh no knowledge "—Co. Litt. 132b.

[17] 17 Mass. 515 (1882).

consequence of which was the attachment of the status of infamy and an inability to give evidence. The Massachusetts court held the status and its consequence to be part of the criminal sentence, thus purely territorial in extent, and allowed the prisoner to testify. Some seventy years later an Arkansas court followed this principle in refusing to give effect to the status of civil death imposed as part of the sentence on a conviction for murder by a Court of the State of Tennessee.[18] This refusal of full effect to a status imposed as part of, or a consequence of, the sentence of a criminal court, does not necessarily imply that such status does not form part of the law of the State denying recognition to the similar status of another State. In *Commonwealth* v. *Green,* for example, the State of Massachusetts attached to persons convicted of certain crimes disabilities similar to that of which it refused effective recognition. This is also a principle of English law, for English law too attaches disabilities of a civil nature to a person convicted of treason.[19] In none of these cases, however, was there a refusal to recognize that a legal status had been created: the refusal was directed against giving extra-territorial effect to a penal condition which was clearly imposed as part of a criminal sentence. Even in questions of the recognition of an unimpeachable form of status, such as that of guardian or curator under a foreign law, English courts always emphasize that the authorization of the exercise of the powers of the status in England rests entirely in the discretion of the court. The status of husband and wife receives universal recognition, but no effect will be given to the incidents of the status in English courts, at least in matrimonial causes, where the status arises from a marriage contrary to the policy of English law, for example, a polygamous marriage. This non-recognition rests more, however, on the nature of the machinery of the Divorce Court than on objections of public policy,[20] for its procedure cannot cope with a plurality of wives of any one man. The Judicial Committee of the Privy Council has had to deal with questions arising out of polygamous marriages, and has recognized the status of secondary wives,[21] and there is little doubt that for purposes other than matrimonial, other English courts would recognize polygamous marriages valid where contracted in cases of a consequent conferment of the marriage status.[22] American courts have consistently followed this principle, accepting fully the universality of a marriage status validly acquired under its proper law in the cases of Indian plural marriages under tribal law,[23] and in one case, of a Mahomedan marriage.[24] But where questions of local public policy are involved, as in the matter of miscegenous marriages in certain American States, and even in the Federal Courts, a resolute and utter refusal of recognition of the status, through a denial of the validity of a valid marriage itself, can be seen in such decisions as U.S. *ex rel. Devine* v. *Rodgers.*[25] But the decision of the domiciliary law upon matters of status will be followed in all other States unless some local fundamental social interest is opposed to such recognition,[26] since it is within the acknowledged power of every State to determine

[18] *Wilson* v. *King,* 59 Ark. 32 (1894).

[19] See *Kynnaird* v. *Leslie,* L.R. 1 C.P. 389 (1866). See also Y. B. Hil. 6 Hen. IV, f. 6, pl. 29, and *Banyster* v. *Trussel* (1596) Cro. Eliz. 516, cited in Winfield, *Law of Tort,* pp. 168-9.

[20] *Hyde* v. *Hyde* (1866) L.R. 1 P. and D. 130.

[21] *Cheeng Thye Pin* v. *Tan Ah Loy* (1920) A.C. 369; *Khoo Hooi Leong* v. *Khoo Hean Kwee* (1926) A.C. 529. *See* W. E. Beckett, 48 L.Q.R. 341.

[22] Canadian courts recognized a polygamous marriage in *Yew* v. *Att.-Gen.* (1924) 1 Dom. L.R. 1166.

[23] *Kobogum* v. *Jackson Iron Co.,* 76 Mich. 498 (1889); *Wall* v. *Williamson,* 8 Ala. 48 (1845).

[24] *Royal* v. *Cudahy Packing Co.* 195 Ia. 759.

[25] 109 Fed. 886 (1901). *Cf.* judgment of Williams, C.J., in *Dannelli* v. *Dannelli's Ador.,* 4 Bush (Ky.) 51, at p. 61 (1868).

[26] See *Kinnier* v. *Kinnier,* 45 N.Y. 535, at 544, *per* Church, C.J.

the civil status and capacities of its inhabitants.[27] These illustrations serve to show that the great principle of the universality of status has its limitations, but that these limitations are usually directed to non-recognition of the contents not to that of the existence under its proper law of the status itself. That this limitation of non-recognition to the incidents of status is not always observed must be stated, however, as a fact. The hope is expressed that, with the coming of a clearer judicial distinction between status and its incidents, a more logical secondary distinction between their recognition will be universally made.

The judicial technique of the Common Law moulds our legal principles into the form of generalizations of judicial decision rather than absolutes of legal doctrine. With this in mind, one might summarize the Common Law theory of status as follows: status is a personal legal condition conferred and determined by the law of the person's domicil. So conferred, it is entitled to universal recognition. The incidents of status, when distinguished from the status itself, possess only territorial effectiveness save in so far as a State in which it is sought to exercise them allows them extra-territorial effect. The incidents of a status appear to be regarded more in the nature of an element of the act than of the status, a judicial treatment which follows closely the basic Common Law attitude towards capacity as governed by the law of the place where such capacity is exercised; an attitude which now most vigorously flourishes in the Common Law's new home. But a partial exception to this treatment of the incidents of a status appears in respect of those incidents which themselves may be exercised to effect status, either in their holders or in others, for example, capacity to marry or to legitimate a child. Capacities of this kind are closely related to status, frequently identified with it by judges, and in English law, and to some extent in American law, governed by the determinant law of status, that of domicil. As capacity, for instance, capacity to contract, varies with different types of contract even in respect of a person endowed with a single status, such capacity is relative to the particular contract rather than the status to which it is attached. Capacity may be described in general as an incident of status variously relative to individual transactions.

Common Law Judges have moved warily in cases involving questions of status. Few have ventured to consider the nature of the conception; but the decisions discussed above and elsewhere show that at least some of the foundations of an acceptable theory of status have been well laid. One may hope that, when this legal structure is completed, it may be found a congenial home for the individual man of the Common Law; for he, after all, has to bear the burden of his status.

NATIVE TRIBUNALS IN THE GOLD COAST COLONY

[*Contributed by* H. B. Thomas, Esq., O.B.E.]

The Gold Coast Colony—the Colony—with an area of about 24,000 square miles and a population of about one and three-quarter millions, all but a few thousand of whom are Africans, comprises about one-quarter of the area and half the population of the British dependency of the Gold Coast (in which is now incorporated British Mandated Togoland). Inland from the Colony, forming the rest of the Gold Coast dependency and each under a differing constitutional régime, lie Ashanti and the Northern Territories.

The coastal region has long been in touch with European commercial enterprise, and by the beginning of the 19th Century was coming gradually

[27] *Pennoyer* v. *Neff*, 95 U.S. 714. "The rights of a government, as well as that of the several states of the Union, to determine the marital status of its own citizens and prescribe the terms and conditions upon which their relations may be changed is elementary and beyond question," *per* Haight, J., *Cunningham* v. *Cunningham*, 206 N.Y. 341 (1912); see also *Ross* v. *Bryant*, 90 Okl. 300 (1923) *per* Branson, J., at p. 302.

under British influence. The Colony was occupied by small autonomous units, contrasting with such a considerable tribal federation as had established itself in Ashanti. These units, now designated States each under a paramount chief and at present numbering 63, are themselves coagulations of chieftainships or stools of which there are several hundreds. The head of each stool is selected by tribal councillors from within a recognized family group. Thus there is a considerable stratum of society interested in the maintenance of the status and privileges of the stools.

The British Government recognized these native authorities long before indirect rule, as a phrase, had been invented, and accepted the justice which the chiefs dispensed in accordance with native law and custom as part of the judicial system of the Colony. Here ready to hand was an organization which should seemingly in its natural development have assumed the functions of a native administration. Yet as lately as 1938 Lord Hailey (*An African Survey*) concludes that the native authorities of the Colony are mainly an agency for the maintenance of stool government, not for effecting improvements in local conditions. By default this latter responsibility has fallen to be discharged by the central—British—Government.

This unfruitfulness, which contrasts sharply with the solid achievements of the native administrations of Northern Nigeria or the Tanganyika Territory, may be attributed to one or perhaps two permeating factors for the existence of both of which stool influence, claiming to speak in the interests of the people at large, is primarily responsible. These factors are finance and land.

An early attempt to introduce direct taxation was boycotted by the chiefs, abandoned after a short trial in 1866, and has never since been revived in the Colony. Without this most proper source of public revenue the native authorities have lacked a steady income with which to finance the activities of effective local government—and the plant has wilted from lack of nourishment. Such fees and dues as pertain traditionally to the stools, of which the fines and fees accruing from the administration of justice form a substantial proportion, are for the most part absorbed in the personal expenditure of the chief and his councillors and in the defence of their privileges.

The land of the Colony was, under tribal conditions, adequately controlled by the stools, whose influence spread nebulously into the unoccupied areas by which their settlements were surrounded. But the chiefs proved quite incapable of resisting the impact of the European introduced economic system under which land acquired a money value. They had gone far in squandering this trust for their private ends when in 1894 the British Government sought to " stop the rot " by bringing the unoccupied land of the Colony under public control. Before an outcry by stool interests that this was veiled confiscation of the people's land and a claim that stool boundaries in the unoccupied land were effectively co-terminous, and thus embraced the whole of the Colony, the British Government abandoned its proposals. As a result native social organization is now burdened by a land tenure system of incalculable and increasing confusion in which the immediate claims of the stool chiefs are opposed to the needs of the great body of their people, an increasing proportion of whom is turning from the tribal to the individualist manner of life.

With the interests of the stools and of the people so largely at variance, the capacity of the former to furnish a public-spirited local government capable of tackling the pressing economic problems with which native society is beset is gravely prejudiced; while sitting as a tribunal the chiefs are in a position to judge their own cause. Tension between the conservative and the progressive elements in native politics is thus constantly in evidence, with the former, resting on the *laissez faire* policy of the British Government, maintaining its ascendancy. It might be assumed that the slowly increasing educated class would range itself solidly with progressive thought. It is thus at first

sight surprising, though not in fact difficult of diagnosis, that some of the more advanced products of Gold Coast education tend to ally themselves with the supporters of the present ordering of native institutions.

Against this background the sum of the recommendations of a local committee appointed by the Governor of the Gold Coast in December, 1942, to report on the native tribunals[1] assumes a greater significance than is suggested by a recital of the details of its findings. For although the Order-in-Council of 1901, which annexed the Colony, constituted the Crown as the only source of legal authority the chiefs have not ceased to regard their powers as inherent and not derivative. Stool influence has frustrated attempt after attempt to reform the native tribunals, some of which furnished, and continue to furnish, instances of abuses of almost Gilbertian character. The Native Administration Ordinance of 1927, by which native tribunals throughout the Colony are at present governed was but a compromise measure which, on the judicial side, failed to give the Governor power to withdraw or even vary the jurisdiction of the chiefs or to provide for administrative supervision and control of their tribunals.

If it may be assumed that the recent Native Tribunals Enquiry—a majority of the Committee's members were prominent local Africans—was set on foot in response to a stirring of popular opinion, and if its findings are now implemented by legislation, a notable step forward will have been taken.

In its common pattern a native tribunal in the Colony is constituted by a chief sitting with his subordinate chiefs and counsellors. Five classes of tribunal are at present recognized. The category of a tribunal is determined by the political status of its chief and without consideration of geographical convenience; each tribunal in the same category has the same jurisdiction without regard to its capabilities; to the number of people it serves; or to the complexity of their affairs. There is an excessive number of tribunals, which as a consequence compete for the available business. Educated men are largely excluded from participation in the administration of justice, for the hereditary element is predominant and the more conservative elders are prone to elect for preference an illiterate colleague so that he may not introduce new ideas. A formidable concentration of judicial and executive functions in a small reactionary body results.

A tradition of unpaid public service is largely absent in the Colony, nor are there any elements of a professional magistracy such as has a well ordained position in Muhammadan states. Few native authorities have instituted a public treasury from which remuneration to tribunal members may be paid. Fines and fees are commonly shared among the members, whose interests thus lie in the direction of an increase of litigation, in the multiplication of fees, and in the imposition of maximum fines. There is no definite number of members of a tribunal and fifteen or twenty may attend, some strolling in and out of the court while hearing is in progress, or dozing to wake up and concur in the findings of their colleagues and share the fees. Under the pretext of conducting an arbitration chiefs who have no right to hold a tribunal have devised a means whereby they too may gather some gleanings from the field of litigation.

The registrars of native tribunals are commonly semi-educated persons, many of them of doubtful honesty. This low standard is attributable to the inadequacy and uncertainty of their remuneration, which is frequently entirely dependent on the collection during the month of a sufficiency of fees and fines; while if the registrar displeases chiefs and counsellors by pointing to irregularities he may be dismissed.

With such a restricted and reactionary membership it is not surprising that

[1] Gold Coast Colony. Report of the Native Tribunals Committee of Enquiry. 29 pp. Government Printer, Accra, 1943. Price 2 shs.

the tribunals inspire little confidence among the native strangers who congregate particularly in the mining and cocoa growing areas and in the towns. They are convinced that they do not get justice from a native tribunal if their case is with a native of the state; and they are unanimous in their preference for British courts.

The power of review by the British Government's administrative officers is confined to criminal proceedings and to civil costs. Native customary law provides no clear frontier between the subjects of criminal and civil proceedings: and by treating an offence as a subject of civil action a tribunal may ensure that its decision is not reviewed by the District Commissioner. Even within the present limits of review, revisional orders may be evaded by native tribunals by delaying the submission of monthly returns of cases until the time limit for review has expired.

There is an absence of simple rules of procedure and evidence. It is common practice, for instance, to place the onus of proof on the defendant where it should be on the plaintiff; a defendant may be called on to disprove the most far-fetched allegations; while sheltering under a conception of native law that B representing A is but the mouthpiece of A, hearsay evidence is constantly admitted. Criminal summonses are sometimes issued in the name of the tribunal which will try the case under the impression that the tribunal is a party to the proceedings, as indeed many members think they are. Fees in native tribunals are more numerous and in some respects higher than in the Supreme Court. Some tribunals, for instance, claim adjournment fees when a case is adjourned of their own motion; while it is a common practice to fine a person for a tortious offence, such as defamation or seduction, though he has already been mulcted in damages. There is much frivolous litigation, and some tribunals solemnly try cases that disclose no conceivable cause of action.

Although legal practitioners are not allowed to appear before native tribunals there has sprung up a race of bush lawyers, who appear for parties under the pretence of being a member of the litigant's family. They have a low standard of education and none of professional conduct, touting for business, fomenting litigation and merely adding to the costs of the parties.

These counts in accumulation seem a weighty indictment of the current dispensation. But they are for the most part venial excrescences on a system of justice which is in essentials well suited to the present social order. They flow from the British Government's past reluctance in the face of the clamour of a small section of the public to carry out the pruning which it knew to be needful for a healthy social advance.

The reforms outlined by the Committee are well reasoned and are capable of attainment without upheaval of the present system. The enactment is proposed of a " Native Courts Ordinance " in which would be set out the normal jurisdiction of the several grades of tribunals or courts with provision for an increase of jurisdiction by the warrant establishing the particular court. Tribunals would be established by order of the Governor-in-Council, and would be classified as Grade A, B, C or D Courts with territorial jurisdictions not necessarily coincident with administrative—state, divisional or village—boundaries. Tribunal members would be appointed by the Governor-in-Council after consultation with the State concerned. For each tribunal there would be a panel of members of whom not less than three or more than five should sit.

In primitive societies executive and judicial functions are as a matter of course exercised by the same authority, and in its present stage of development the Colony will be best served by a continuance of this arrangement. But it is significant that the Paramount Chiefs should themselves have become aware of the inconvenience of this compromising duality of function, and support a proposal that they should no longer act as presidents of a tribunal, and should only exceptionally sit as members. They will thus be in a position to concentrate on

their increasingly important administrative duties while the way will be opened to the appointment to each tribunal of a permanent president, to be elected by the State concerned and approved by the Governor-in-Council, who could specialize in judicial work.

Though it is regarded as necessary that tribunal members should continue to receive payment for their services, either by way of a sitting fee or of a stipend for their period of duty, the sharing of fines and fees would be prohibited. At the same time an adequate and regular salary for the registrar of a tribunal must be assured. As a practical result no tribunal is likely to qualify for recognition unless the native authority of which it is a part maintains a properly organized treasury and budgets for revenue and expenditure. The improvement in the status and prospects of registrars, who should be the equivalent of justices' clerks, will make it possible to demand a higher standard of qualification; and attendance by registrars at a course of instruction would eventually be required before first appointment.

Other recommendations for the reform of the judicial machinery cover the establishment in mixed population and urban areas of specially constituted courts upon which the larger stranger communities would be represented: while in order to attain some measure of finality in the seemingly endless disputes regarding land it is proposed to provide a land court under the presidency of a Land Judge which would constitute the final court of appeal in all land cases coming up from native tribunals, where the subject matter does not exceed £300 in value. Holding that native law is a matter of common knowledge and not of technicalities calling for expert advocacy the Committee does not propose any relaxation of the present restriction on the appearance of professional pleaders in native courts: while a person appearing on behalf of another should prove that he is in fact within one of the categories of persons entitled to appear.

When the Committee came to consider the improvement of the quality of the justice dispensed by the tribunals it recognized how greatly native customary law is in need of guidance in its struggles to adjust itself to the problems by which native society is now faced. The Government of Uganda has recently appointed a Judicial Adviser to the Native Government of Buganda (a province having a special constitutional status and comprising about a quarter of the Uganda Protectorate); a similar appointment is recommended for the Colony.

The Judicial Adviser, Buganda, is by ordinance[2] given powers of revision which replace those formerly exercised by officers of the Provincial Administration. He has access to all courts and to their records and proceedings: and, subject to certain provisos, may of his own motion revise any original or appellate proceedings of a Buganda native court; or may quash any proceedings. Further when an appeal from any decision of the principal native council's court does not lie to the High Court, appeal lies to the Judicial Adviser. The Gold Coast Committee does not propose that the Judicial Adviser in the Colony shall undertake such comprehensive duties. Rather the power of review by administrative officers should be extended to embrace all proceedings whether criminal or civil with the Judicial Adviser as a "final authority."

But a Judicial Adviser will attain success or otherwise, not through the exercise of his statutory powers, but by the measure of patience and understanding which he can bring to the task of securing willing acceptance of his advice. In this field of undefined limits he would be responsible for the preparation of model rules of court dealing with procedure and evidence; he would suggest to the State Councils subjects upon which they might usefully make declarations and modifications of customary law: and he would supervise the arrangements for training registrars.

Here in itself is a full programme: nevertheless the Judicial Adviser's long-

[2] Buganda Courts Ordinance, 1940, Uganda No. 4 of 1940.

range objective should be not the crystallization of the two systems of jurisprudence, one indigenous and one alien, which now exist in the territory, but their eventual fusion into a single system, which will in the process rid itself of the infinite complexities and tensions which come from a recognition by the law—at present inevitable—of differences of race and colour. To keep alert among the native authorities a spirit of progressive adjustment towards this end will certainly be among the Judicial Adviser's most important contributions—and difficult tasks.

The present report thus points to the beginnings not to the end of reform. Not the least of its merits is its sincere and factual review of the shortcomings of the present native court system. Hypnotized by the "blessed" words—Indirect Rule; reluctant sometimes to make admissions which might seem to reflect upon their own political acumen; and under the pretext that criticism might undermine the prestige of native rulers, governments and political officers in British tropical Africa have too often deflected the light from the failings of native authorities. Forgetting that constructive public comment is as oxygen to the maintenance of a healthy atmosphere around any system of government, the British authorities may thus find themselves committed to an uneasy alliance with the forces of reaction. A promising native authority can equally be demoralized by undiscriminating public adulation or by a knowledge that a veil will always be drawn upon its ineffectiveness. The obscurantism which has so frequently characterized British colonial policy is a reflection of the past unsureness of the Imperial Government—to often following instead of guiding ill-instructed public opinion in England—of the ethical foundations of its mission in West Africa as elsewhere; and herein is that "lack of larger purpose," the subtle malady which a *Times* correspondent sensed in Malaya before its downfall.[3]

The time for reforms in the Colony is opportune and perhaps urgent. The end of the War will see the return to their Gold Coast homes of large numbers of men from the Services. They will have a greatly widened vision of the world of which they are a part, and will have experienced the impeccable leadership of British officers. If their own chiefs fail to provide them with disinterested and intelligent leadership they are likely to vent their dissatisfaction not primarily on their tribal institutions but rather on the British Government which has failed to adapt these institutions to the needs of a future of unprecedented perplexity.

THE INTERNATIONAL LAW OF THE FUTURE

[*Contributed* by F. N. Keen, Esq.]

Under the above title the *Canadian Bar Review* for April 1944 publishes a statement which is the product of a long series of discussions extending over two years and participated in by groups of persons, numbering together nearly two hundred. The participants were chiefly Americans and Canadians, and were persons known to have an active interest in international law. They included judges, practising lawyers, professors, government officials and men of special international experience. The statement is presented as a community of views, reflecting in its entirety the views of a large number of the participants in the discussions, but it is not to be taken either in whole or in part to represent the individual views of any particular person.

The statement seems admirable in its method of approach to the subject.

An introduction stresses the importance of giving consideration to the long-term conditions upon which an enduring peace will depend, and searching for means and methods of attaining security from war. It suggests that a

[3] *The Times*, 1st August, 1942.

special responsibility rests in this respect on the legal profession, for security depends upon the maintenance of an effective legal order.

The development of international law is described as having been retarded both by the lack of international organization and by the insistence of States upon freedom to use force to accomplish their ends.

It is suggested that, with the United Nations playing the dominant role at the end of this second world war, and with large power concentrated in the hands of peoples who desire to seek escape from the recurrent necessity of mobilizing for destruction, a world situation may exist in which the further progress of organized effort can be assured, and that to this end departures will have to be made, new methods will have to be tried, new institutions will have to be created, and sound legal foundations will have to be laid. The task, it is said, must be approached not only with a knowledge of the history of the past, but also with a willingness to appreciate the lessons of that history.

The statement then proceeds to set forth the lines which it suggests might be followed in shaping the international law of the future. They are arranged under three headings: "Postulates," "Principles" and "Proposals."

The Postulates are intended to indicate the premises essential for the establishment and maintenance of an effective legal order in a world of states. They are stated to be the foundations on which the Principles and Proposals have been drafted.

The Principles are offered as a draft of a declaration concerning the international law of the future which might be adopted by a competent international authority.

The Proposals are presented, not as a draft of an international instrument, but as indications of measures which might be adopted to implement the Principles. They are described as being confined to the dispositions which might be adopted and the institutions which might be maintained for the ordering of the future world society, and as proposing agencies and methods and procedures by which the solution of recurring problems can be sought, rather than the precise solutions to be given to such problems.

There are six Postulates, ten Principles, and twenty-three Proposals. Each is concisely worded, and is followed by a useful "Comment" in which reasons and explanations are given and precedents, parallels and historical antecedents are referred to.

The Postulates seem well framed for indicating the broad ideas on which the future international organization should be based. They merit quotation in full, and are as follows:

1. The States of the world form a community, and the protection and advancement of the common interests of their peoples require effective organization of the Community of States.

2. The law of the Community of States is international law. The development of an adequate system of international law depends upon continuous collaboration by States to promote the common welfare of all peoples and to maintain just and peaceful relations between all States.

3. The conduct of each State in its relations with other States and with the Community of States is subject to international law, and the sovereignty of a State is subject to the limitations of international law.

4. Any failure by a State to carry out its obligations under international law is a matter of concern to the Community of States.

5. Any use of force or any threat to use force by a State in its relations with another State is a matter of concern to the Community of States.

6. The maintenance of just and peaceful relations between States requires orderly procedures by which international situations can be readjusted as need arises.

The Principles are well framed for indicating broadly the substance of

fundamental laws which ought, from the start of the international organization, to be accepted as governing the conduct and relations of all national States towards each other and towards the Community of States. They wisely take the form of the imposition of duties rather than the conferment of rights. Nations are ready enough to think about their rights and interests. The trouble is that they are too little ready to think about their duties.

The Principles lay it down as the duty of each State:

(i) to carry out in full good faith its obligations under international law, and not to invoke limitations in its own constitution or laws as an excuse for non-performance;

(ii) to see that conditions prevailing within its own territory do not menace international peace and order, and to treat its own population in a way that will not violate the dictates of humanity and justice or shock the conscience of mankind;

(iii) to refrain from intervention in the internal affairs of any other State;

(iv) to prevent the organization within its territory of activities calculated to foment civil strife in the territory of any other State;

(v) to co-operate with other States in establishing and maintaining agencies of the Community of States for dealing with matters of concern to the Community, and to collaborate in the work of such agencies;

(vi) to employ pacific means and none but pacific means in seeking to settle its disputes with other States, and failing settlement by other pacific means to accept the settlement of its disputes by the competent agency of the Community of States;

(vii) to refrain from any use of force and from any threat to use force in its relations with another State, except as authorized by the competent agency of the Community of States, without prejudice to its right, subject to immediate reference to and approval by such competent agency, to oppose by force an unauthorized use of force made against it by another State;

(viii) to take, in co-operation with other States, such measures as may be prescribed by the competent agency of the Community of States for preventing or suppressing a use of force by any State in its relations with another State;

(ix) to conform to the limitations prescribed by the competent agency of the Community of States and to submit to the supervision and control of such an agency with respect to the size and type of its armaments;

(x) to refrain from entering into any agreement with another State, the performance of which would be inconsistent with the discharge of its duties under general international law.

So far the statement seems excellent in its prescriptions.

All peace-loving people in this and other countries, whether in official positions or among the general public, are vitally interested in ensuring that the international organization to be established and maintained after this war shall be such as will really and effectively abolish war. These Postulates and Principles seem well designed for giving a good start in that direction. It is clear, however, that the realization of the high aims they embody depends upon the way in which they are implemented in the actual structure and powers and working methods and institutions of the future international organization. When one comes to look at what the Proposals suggest on these matters enthusiasm may well be damped down, for, taken as a whole, the Proposals appear to foreshadow the setting up of machinery which would not be likely to prove really effective in practice for implementing the Postulates and Principles and maintaining the peace of the world. There is an ominous parallel in the Covenant of the League of Nations, which started off in its Preamble with an excellent statement of high purposes, but in its operative articles provided for an organization insufficiently equipped for implementing those principles effectively and preventing a second world war. It is imperative

that any proposals for international organization after the present war should be closely examined from a practical and realistic standpoint.

In some respects the Proposals are satisfactory up to a point, but unsatisfactory in their full application. For instance, they propose that the Community of States should be organized on a universal basis, that no provision should be made for the expulsion or withdrawal of any State, and that the activities of any regional organizations of States must be co-ordinated with and consistent with the general organization. International law, so far as it exists to-day, claims universal operation, and universality seems wholly sound so far as it means the bringing of all States under the laws and regulative processes of the international organization, but surely there is need for some qualification upon its operation in regard to the exercise of the powers entrusted to the organization. For example, in the case of some States it might be considered that their population and resources are too small to make it reasonable for them to undertake the responsibility of sharing in the exercise of the powers of the organization. It must be remembered that there are some independent States whose population does not even reach one million. Again, some States might be disqualified from sharing in the exercise of powers through having given recent evidence of an aggressive character. The case of Germany and Japan is directly in point. While there is special need for the activities of these aggressors being brought effectually under the control of international law, it does not seem likely that the other States would be willing to admit them to full partnership in the exercise of controlling and law-making powers in the first instance, or until they have given satisfactory evidence of a fundamental change of outlook and methods.

Again, the Proposals proceed on satisfactory lines in requiring that a General Assembly, in which all States should be entitled to representation, should be established to serve as the general representative and deliberative organ of the Community of States, and should be enabled to act by a simple majority except in the exercise of certain functions for which a two-thirds majority is expressly required. But the Proposals stipulate in regard to the more important matters, such as the exercise of the power to modify general rules of international law and to enact new general rules of international law, to make recommendations for peaceful change, and to amend the constitution of the organization, the Assembly should only act with the concurrence of the Executive Council. It is proposed that the Executive Council shall include only certain States, named in the first instance, and afterwards selected by the Assembly with special consideration of the importance of their role in international affairs, and that it shall take decisions only by unanimous vote, except that it may decide by a bare majority on matters of procedure and appointments and certain other minor matters, and by a majority of two-thirds in offering advice as to the revision of executory treaties or engagements and the readjustment of dangerous international conditions. Thus the new international organization, like the League of Nations, would be liable to be paralysed for effective action in vital matters by the unpractical requirement of unanimity among the States represented on the Council.

Moreover, the Proposals include no provision for any difference between the voting powers of different States either in the Assembly or in the Council, although the "Comment" on Proposal 2, which deals with the Assembly, recognizes that it may be desirable to establish from the outset a system of weighting the votes of States in the Assembly, in view of the fact that States vary so widely in size and influence and the responsibilities which they can assume are so disparate. It surely is wholly unpractical and undemocratic to suggest that, for the purpose of the exercise of the powers of the Assembly, Nicaragua, for example, should be placed on a par with the United States, and a State representing a population of, say, two hundred million should have only the same voting power as a State representing two million. It ought to be possible for

the States concerned to agree upon a scale of voting power which would make reasonable allowance for wide disparities of population, without allowing the States with the largest populations to swamp the rest. In the absence of an arrangement of that kind, it is difficult to see how you can get the Community of States effectually organized for united and collective action in the general interest.

Much time and thought is being given in many quarters to plans for obtaining international co-operation for purposes of vast importance in various fields by general agreement among States. Experience shows how difficult it is to secure and maintain agreement among a great number of States for international purposes. The most urgent and important need is to establish effective machinery for enabling the Community of States to take collective action in the interests of peace, justice and general welfare and to set up subsidiary bodies so far as necessary for that purpose when agreement among all the States concerned is unobtainable. The only way to meet this need is to accept majority decisions and legislative processes as the basis of the General International Organization. The late Professor Lorimer of Edinburgh University hit the nail on the head when in his "Institutes of the Law of Nations," published in 1884, he wrote "The ultimate problem of international jurisprudence is: "How to find international equivalents for the factors known to national law as legislation, jurisdiction and execution?"

The Proposals suggest that the Assembly and the Council should each be given, in identical words, a vague general power to deal with any matter of concern to the Community of States. This follows the precedent of Articles 3 and 4 of the Covenant of the League of Nations and seems unwise both as regards the vagueness of the power and as regards the placing of the Council on an equality with the Assembly in its exercise. To my thinking international organization is only likely to prove successful if it proceeds on the basis of leaving the independence and sovereignty of the individual States undisturbed except in regard to specific matters clearly agreed upon and defined, and in regard to those matters giving to a General Assembly representing all the responsible and governing States a position of indisputable supremacy and a clear power of legislating by international statutes carrying an authority that cannot be challenged. Only thus in this democratic age is the rule of law likely to be established successfully between nations and the practice of war abolished.

The same vagueness and the same failure to realize the essential functions of and relationship between a General Legislative Assembly and an Executive Council characterize the following provision with regard to the control of the use of force, which is contained in paragraph (2) of Proposal 9:

> "Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any use of force or threat to use force by a State in its relations with any other State, to take such action as it may deem to be necessary for the protection of the interests of the Community of States, and to prescribe the specific measures to be taken by States for preventing or suppressing the use of force."

We all know now, by painful experience, how tough and difficult a task it is to organize the use of the collective force of peaceful nations to control aggressive tendencies on the part of a particular State or group of States, and to what extensive and stringent controls the people must submit and are prepared to subject themselves for this purpose through the action of the majority of their representatives in Parliament. It seems clearly unpractical and little likely to prove effectual for the purpose of applying and organizing international force to give a vague general power to an Executive Council representing a few States, and to enable it to take only such action as it can decide upon unanimously. The only practical and hopeful way of proceeding in this vital matter is to follow the democratic line, and to entrust all specific powers necessary

for requiring and controlling the collective action and regulating the activities of the executive body with respect thereto to a supreme legislative body on which the governments of all the responsible and co-operating States are entitled to have their say and to have a reasonable share in the voting power and to arrive at definite and binding decisions by reasonable majorities.

The authors of these Proposals seem to have based them too much on the model of the League of Nations, which failed in its most important function, the maintenance of peace. They would have done better to learn from the successful working of the English constitution, and particularly, from its application of the principle of parliamentary supremacy and its use of the process of legislation by majority to give effect to the general will.

Even in the case of the Executive Council I question whether many of the States which share the burden of responsibility for the activities of the organization would be content to have no voice in the exercise of power. My impression is that all the responsible States may want to be represented and have their appropriate voting power in the Executive Council as well as in the Legislative Assembly, and that the need for the carrying on of executive functions by small and quickly-acting bodies may have to be met by the Council's appointing committees, just as would be done in this country by a large executive authority such as a county council.

It will no doubt be important for certain of the leading and more powerful States to be prepared to take the initiative in the conduct of the activities of the international organization and to accept large responsibilities in relation to it, but any extra degree of power to which such a position of responsibility may entitle them ought to be accorded rather by the allocation to them of a larger share of voting power in a general body on which all States have a voice than by giving them exclusive powers or rights of veto in the exercise of which other States are denied any share.

Proposal 23 deals with the subject of amendment of the constitution of the international organization. This is a highly important matter, for the future organization will, like the League of Nations, be in the nature of a new experiment in the conduct of international relations, and change and development of its constitution in the light of experience ought therefore to be made reasonably free from difficulty. When the League of Nations was established this need was not observed and the power of amendment was so restricted that not a line or word of the Covenant could be altered without ratification by every single State represented on the Council, of which the five States then counting as Great Powers were intended to be permanent members, though curiously enough, ratification was required by only a bare majority of the States composing the Assembly. Proposal 23 makes a similar mistake. It proposes that any amendment of the international instrument creating the organization of the Community of States, in addition to a two-thirds vote in the Assembly, shall require the concurrence of the Executive Council, on which Proposal 3 provides for decisions to be taken by unanimous vote. This requirement of unanimity on the Council for amendments would place a serious obstacle in the way of future development of the organization by a gradual process of evolution.

Principle (vi) lays it down that, failing settlement by other pacific means, it is the duty of each State to accept the settlement of its disputes by the competent agency of the Community of States. This is in accord with Postulate 6, which says that the maintenance of just and peaceful relations between States requires orderly procedures by which international situations can be readjusted as need arises. The principle appears sound, for it is difficult to see how international organization can work successfully if, while denying any place to the use of national force for serving national policy, it fails at the same time to provide effectively for administering international justice and settling the disputes and remedying the grievances of nations. On this topic, however, the Proposals

seem very weak. Proposal 17, it is true, suggests that the Permanent Court of International Justice should be given compulsory jurisdiction for settlement of all international disputes of a purely legal character upon an application by any party to the dispute. But war tends to arise not so much from disputes between States as to what are their respective legal rights, but from the desire to change or depart from their territorial or other legal rights, or to secure new legal rights, or from disputes about other matters of a political or non-legal kind. Proposal 18 deals with such disputes and provides that the Executive Council shall have power to take cognizance of them, but makes no provision for a binding settlement except by a decision which is given unanimously, subject to the exclusion of the vote of any party to the dispute. Proposals 21 and 22, which deal with the revision of executory treaties or engagements and the readjustment of dangerous situations between States, provide merely a power by a two-thirds vote to give advice to the States concerned, and not for a binding settlement of any dispute.

It seems unreasonable to expect that in all, or even in most cases of serious political disputes involving danger of war, the Council would be sure, or even very likely, to be unanimous. The settlement of such disputes between States requires decisions which are really of a legislative character. If the international organization is to impose upon disputing States compulsory settlements of such disputes a preliminary inquiry of an impartial nature may be needed in order to elicit the true facts and to ensure that due consideration is given to the contentions of the States concerned, but the final and binding decision needs to carry with it all the weight of a legislative enactment given under the authority of an assembly representing all the States which will be collectively responsible for supporting and enforcing the new legal rights and obligations thereby set up.

For dealing with the settlement of international disputes of a legal character the Permanent Court of International Justice already exists and was operating between 1921 and the outbreak of the present war. A very valuable report has recently been made by an Informal Inter-Allied Committee presided over by Sir William Malkin, G.C.M.G., K.C., Legal Adviser to the Foreign Office, on the future of this Court. The Report is published by His Majesty's Stationery Office (Cmd. 1944, No. 6,531, price 9d.). It deals in a very full, clear, and convincing manner with all the major problems and the broad issues of law and policy affecting the future of the Court. It recommends that the organic connection which has existed between the Court and the League of Nations should not be continued, but it assumes that after the war some General International Organization will be set up and expresses the view that the Court should be regarded as part of the machinery at the disposal of that Organization. It contemplates the probability that it will be considered desirable that the Court should be universal in character, in that it should be open to all civilized States to become parties to its Statute, and thereby entitled to take part in the activities connected with the Court. On the question of compulsory jurisdiction paragraph 60 of the Report contains the following passage:—

> "While we consider that acceptance of the compulsory jurisdiction of the Court should not be made a condition of accession to the Statute, this would not prevent its being made, in such circumstances as the States concerned considered proper, a condition of membership of a future General International Organization. The Constitution of such an Organization may well contain provisions for the settlement of disputes between its members, and, if so, it would be perfectly natural to lay down there the conditions in which the members of the Organization bound themselves to have recourse to the Court for the settlement of justiciable disputes between themselves."

It is perhaps a point for criticism that, while contemplating in the above passage that a General International Organization will be established and may involve compulsory settlement of justiciable disputes, the Report suggests in

paragraph 62 that the existing provisions of Article 38 of the Statute of the Court as to the nature and sources of the law to be applied by the Court should remain unaltered, and makes no allusion to the possibility that, through the endowment of such General International Organization with legislative powers, international statute law may in future become one of the types of law, and indeed may be the principal type of law, to be applied by the Court.

LAND TENURE IN MAURITIUS AND FIJI

[*Contributed by* C. K. MEEK, ESQ., D.SC.]

MAURITIUS and Fiji are similar in that both are dependent upon sugar as their main product and both originally derived their supply of labour from India. In the development of the position of the Indians there is, however, a notable difference in the two Colonies.

Mauritius has an area of 720 sq. miles. The population in 1939 was estimated to be 419,059, of whom 271,687 were Indians. The density of 582 persons to the square mile is very high for an agricultural community. The climate is relatively free from extremes, but tropical cyclones at times cause heavy damage to the crops, and occasional droughts have also led to much distress.

The land distribution in 1940 was as follows:

Lands under sugar cane	150,845	acres
,, ,, secondary crops ..	24,196	,,
Crown lands and reserves ..	80,733	,,
Township lands	18,240	,,
Other lands	186,786	,,
Total	460,800	,,

The amount of alienated land constitutes about 83 per cent. of the total area. Most of it became private property as a result of concessions made during the period of French occupation, but the large areas held by Indians were acquired under systems of "metayage" or "morcellement," whereby many large estates were parcelled out among the tenants. These systems are still practised, though on a much reduced scale.[1]

In Mauritius land tenure, like the whole of the economic life of the island, is subject to the dominance of the sugar industry. Eighty per cent. of the cultivable area of Mauritius is under sugar-cane, 80 per cent. of its essential foodstuffs are imported, and 98 per cent. of its exports take the form of sugar. There are about 70 sugar estates, of which rather more than half are equipped with factories, and there are some 20,000 small planters, whose holdings constitute about 43 per cent. of the total area under cane. Most of these small planters are Indians, or the descendants of Indians, who came to Mauritius as indentured labour, and when freed from their indenture became independent growers, though many still supplement their incomes by working as part-time labourers on the estates.[2] Mauritius thus presents a striking parallel to Fiji,

[1] It is interesting to note that among the qualifications for the franchise in Mauritius are (*a*) ownership of immovable property of the annual value of at least Rs.300, or (*b*) tenancy at the rental rate of at least Rs.25 a month.

[2] In 1940 the figures for Indian cultivation of cane were as follows:

On estates	10,895	acres
Off estates	38,258	,,
Estate ownership	5,515	,,
Total	54,668	,,

This total represented 36.2 per cent. of the total cane cultivation.

where 43 per cent. of the population are descendants of East Indians, who came to Fiji as indentured labour for the sugar estates. But in Fiji the East Indians have become partners with the Colonial Sugar Refining Company, which relies almost entirely for its supply of sugar on the efforts of small growers, and provides them with technical guidance and other assistance; in Mauritius the small growers have regarded the factories merely as a market.

In 1937 the grievances of the small planters led to considerable unrest. A Commission appointed to enquire into these grievances found that the causes were the excessive rates charged by the factories for crushing canes, the cuts made in the prices offered for a particular species of cane, the absence of control over weighbridges, the necessity of having to sell their produce through particular dealers, and the general lack of credit facilities.

As a result of recommendations made by the Commission, the "Cane Planters' and Sugar Millers' Control Ordinance" was enacted in 1939. This provides for the establishment of a Central Board, with a regional committee in each of the nine districts of the island. Each committee consists of two representatives of millers and four of the planters, of whom two must be small planters, i.e., producing less than 1,000 tons per annum. The regional committee is empowered to deal with disputes between planters and millers, and any dispute which cannot be settled by the regional committee is referred to the Central Board. Planters growing cane in a particular factory area must send their canes to that factory, and the miller is bound to purchase all canes inside that area and to refuse canes grown outside.

With regard to middlemen, the view of the Government is that the middleman still serves a useful purpose by supplying credit to small planters. But his activities must be controlled. Under the Ordinance, therefore, every middleman must obtain a permit from the Registrar; this permit may be cancelled if the Central Board has reason to believe that the holder is not a fit and proper person to continue to hold a permit. The prices to be paid by a middleman for canes must be fixed by the miller in consultation with the planter.

Furthermore, in 1939, a "Small-Planters Association" was formed under the Industrial Associations Ordinance (No. 7 of 1938). This will keep a close watch on all contracts between millers and small planters. With the establishment of the principle of free negotiation between the miller and the small planter, and of a right of appeal to the Central Board, it may be expected that the position of small-holders will be considerably improved.

Dr. Martin Leake has expressed the opinion that the larger estates would profit by dividing up their lands into small holdings and leasing these, thereby reducing their direct labour bill and so solving the problem of the wage-paid labourer. He added, also, that Mauritius might soon be faced with the problem of how to use the excess land. The increase of home production of food would seem to be linked up with that of the extension of small holdings. With these systematically organized on a basis of family cultivation, partly planted with cane and partly with food crops, and with access to grazing areas, the local food supplies could be substantially increased.[3] Mauritius is a good example of the dictum that the character of the tenure must depend on the type of rural economy which it is proposed to promote.

Fiji.—The Fiji Islands provide an interesting illustration of a plural society. The small European population (slightly over two per cent.) is mainly concerned with the management of the sugar and copra industries; the East Indian (43 per cent.) with the cultivation of sugar-cane and rice; and the Fijian (50 per cent.) with the cultivation of foodstuffs and cocoanuts. The reconciliation of the interests of the three groups has not been easy, but it has been achieved to a remarkable degree. Most of the Indians in Fiji are Fiji-born

[3] Dr. Martin Leake, "Further Studies in Tropical Land Tenure," in *Tropical Agriculture*, Vol. XVI, No. 1.

and regard themselves, and are regarded by the Government, as an integral part of the community. They have done good service to the indigenous Fijians by teaching them the art of field agriculture.[4] The Fijians, on the other hand, have been generous to the Indians. Their recent surrender of the control of their excess lands has enabled the Government to place the relations of Indians and Fijians on a sound foundation of good will.

In the early days the sugar canes of Fiji were grown by the various companies with hired labour indentured from India.[5] But in 1913 experiments were begun by the Colonial Sugar Refining Company, with a view to converting the estate system into one of small holdings, and establishing thereby a contented peasantry with a direct interest in the land. These experiments proved so successful that the Company now relies almost solely for its supplies of cane on peasant farmers who are either tenants of the Company or lessees of lands owned by Fijians.[6] The Company's tenants are given a ten-years' lease which is readily renewable and contains clauses to ensure proper cultivation. The holdings are of 10 acres and are cultivated in four sections—2½ acres planted with sugar cane, 2½ acres of ratoon crop, 2½ acres of Mauritius beans ploughed under for fertilization, and 2½ acres of young cane plants. The farms are so arranged that the sections similarly used adjoin, thus making for economy in the large-scale harvest operations which are carried out co-operatively. Payment is made according to the sugar content, and this itself is an inducement to good husbandry. The Company also provides transport, which has always been one of the main problems of peasant agriculture. But an even more important service is the system of estate overseers who act as the advisers and friends of the farmer, and form an essential link between the field and the factory. Tenants are not permitted to grow any other crops except sugar cane and green manures, but they are encouraged to establish gardens round their homesteads. If need be, they are given cash advances on easy terms.

This partnership between a Company holding a monopoly, and a peasant population, has been one of the most remarkable developments of Colonial agriculture in recent times, and may prove to be one of the solutions of the difficulty of adapting local peasant proprietorship to the large-scale operations of international trade. Its success is evident from the keen competition to become tenants of the Company. If it can be criticized at all, it must be from the point of view of the danger of excessive reliance on a single crop. Mixed farming is nowadays held to be the best form of insurance for peasant agriculture. Yet, if production and distribution can be controlled by international action, then it would seem to be a sound principle that every colony should concentrate on the crop which it can most profitably produce.

The Fiji Islands were ceded to the British Crown in 1874, and by article 4 of the deed of cession, the absolute proprietorship of all Fijian country not shown to be already alienated, or in actual use or occupation by some tribe or chief, or not actually required for the probable future support or maintenance of some chief or tribe, was declared to be vested in Queen Victoria and her successors.[7] Since then there have been various land ordinances, but until

[4] The indigenous system of land holding was largely one of service-tenures. The chief could call for the labour of any district and use it for planting, house-building, etc. In times of famine the chief would declare the produce of plantations to be common property.

[5] Indian labour was first introduced in 1878, when the cultivation of sugar began to pass into the hands of large companies working with modern machinery.

[6] Tenant farms leased by Indians from Fijians vary in size from about 2½ acres to 12. The average yield per acre produced by non-tenants of the Company is 20 tons, as compared with the 23 of tenants. Not all Indian farmers grow sugar cane. Some practise mixed farming, raising rice and corn and keeping cattle and goats. The total area farmed by Indians was (in 1939) about 110,000 acres, of which some 33,000 acres were held as cane-growing tenants of the Company. Some 2,000 or 3,000 acres are held by Indians as freehold.

[7] But ownership was later restored to the Fijians.

1940 the ordinance of 1905 governed the tenure of land. This Ordinance enabled natives to lease their land to anyone they pleased, provided that the consent of the Governor-in-Council had first been obtained. Arrangements for such leases had to be made through the Commissioner of Lands, and the leases to be duly registered. Fijian lessees were forbidden to transfer or otherwise embarrass their interests without permission, but other lessees were allowed to do so. The leases carried certain conditions requiring the improvement of land. When a lessee wished to renew a lease he applied to the Commissioner of Lands. If an owner refused renewal he had to pay the value of improvement unless it could be shown that the land was genuinely required for his own use. Otherwise the lease was compulsorily extended. The usual term for agricultural leases was 21 years, and for extensions 10 years. Rents were paid through the Treasurer, 10 per cent. being payable to the Government, 40 per cent. to the chiefs, and 50 per cent. to the " mataqali " or land-owning group. The land legislation also prohibited the alienation of native land by sale, grant, or exchange, except to the Crown, and it was laid down that when a " mataqali " or land-owning group became extinct its land automatically became the property of the Crown as " ultimus haeres." Finally, it was made an offence for anyone to be a party to any contract or arrangement relating to the tenure of any native lands, except with the written consent of the Governor-in-Council.

Such was the general situation until 1940, and it could be claimed that, in so far as alienation of land was concerned, the British Government had done its duty by the Fijians. After 65 years of British rule native owners remained possessed of some 3,770,000 acres out of a total of 4,500,000, or 83 per cent. Of the area lost to them, more than half (415,000 acres) had been alienated as a result of sales prior to the Act of Cession. As regards the area alienated to the Crown, 118,336 acres had been acquired as " ultimus haeres," and 82,215 acres as vacant lands for which no claim had been made.

Yet the land policy failed to meet the complex situation, caused in the main by the permanent settlement of Indians in the Colony. Although the Fijians owned all the agricultural land and derived good incomes from the leasing of their lands, they looked with envy on the wealth derived by Indians from their leased sugar-cane holdings. But cane cultivation is highly specialized work and was formerly considered to be beyond the competence of Fijians, the form of whose social organization was not conducive to the development of the individual enterprise which cane-production seemed to demand. Yet, through the encouragement of the Government and the co-operation of the Colonial Sugar Refining Company, Fijians began, about 1933, to engage increasingly in sugar-cane cultivation. In that year the Government enacted a Native Lands (Occupation) Ordinance which enabled an individual Fijian cultivator to obtain security of tenure over a portion of tribal land and to enjoy the proceeds of his labour without interference from other members of his social group.[8]

This development caused anxiety among the East Indians. The area on which cane could be grown was limited and competition keen. Moreover the Government, in order to protect the Fijians from their own improvidence, had (in 1930) initiated a policy of reserving permanently, for the exclusive use of Fijian communities, areas of their own unleased land in the vicinity of their villages. But quite apart from that, it was open to Fijians, on the expiration of a lease, to take back the land of their Indian tenants, on payment of compensation for growing crops and improvements. Many Fijians, who were eager to obtain for themselves the profits made by the former tenants, resumed the land and embarked on cane cultivation, but soon abandoned it, as they had not yet learned the necessary technique. In this way much good agricultural land was thrown out of cultivation, the sugar industry suffered, the dispossessed Indians had to find new homes, and their Fijian supplanters lost their rents.

[8] This Ordinance (No. 35 of 1933) later became unnecessary and was repealed.

The question of the length of lease was one that had long rankled with the Indians. Before 1930 Indians could not hold a lease for more than 21 years—a period which they considered insufficient for the recovery of capital spent on housing, equipment and general development. This discrimination against Indians was eventually removed and extensions, under certain circumstances, were granted for a further period of nine years. But many Indians still objected to the leasehold conditions. Abuses had also arisen. Although the rents charged on leases of native land were fixed by the Government, yet, owing to the keen competition for cane and other lands, Indian leaseholders frequently sublet their holdings at increased rents or transferred their leases for a heavy premium. High premiums were also charged by Fijian owners for consent to a lease on renewal. On all these accounts, many of which were of their own creation, the Indians attacked the entire system of tenure, and there was a general demand for freehold grants, or failing that, for leases of the longest possible duration.

By 1936 the Government had come to the conclusion that a greater measure of control over lands was necessary, if the interests of the Indians and Fijians were to be co-ordinated, if continuity of agricultural policy and security of tenure were to be attained, and if the existing wasteful system of agriculture[9] was to be replaced by a planned economy. The Fijian leaders freely shared this opinion of the Government, and in 1940 the Native Land Trust Ordinance (No. 12 of 1940) was enacted—an Ordinance which is likely to have an influence far beyond the confines of Fiji. Under this Ordinance the control of all native land[10] is vested in a Board. Although it is provided that the Board shall administer the native lands for the benefit of the native owners, it is clearly the intention of the legislation that the interests of other sections of the community shall also be considered. The Board is to have the assistance of local committees which will advise it on questions of land tenure. This is an important innovation. There is an obvious need in all colonies for local agencies to deal with problems of land. In Fiji the local committees will provide an opportunity for the representation of Indian interests, which will not be directly represented on the Board itself.

The Ordinance further prescribes that native land shall not be alienated by native owners, whether by sale, grant, transfer, or exchange, except to the Crown, and shall not be charged or encumbered by native owners. All instruments, therefore, which purport to transfer or encumber any native land, without the consent of the Board, are declared to be null and void. The Board is empowered to grant leases and licences of portions of native land not included in a Native Reserve, provided it is satisfied that the land is not beneficially occupied, or likely to be required by the native owners. But all dealings in leases are subject to control.[11] The Board's sanction is required for sub-leases—an important provision which will enable the Board to see that the rentals charged to sub-lessees are not unduly high, and that the general conditions of sub-leases are not harsh, as they had often been in the past. It is to be observed that licences, as distinct from leases, are issued in respect of the tenure of land as between natives on native lands, and also in respect of grazing

[9] The Director of Agriculture considered that leases should be capable of extension to periods varying between forty to sixty years. Under the short-term and haphazard system of leasing, many Indians had used the land wastefully, picking out the good soil and leaving the bad, obtaining the utmost yield for a brief period and then surrendering the impoverished land.

[10] Native land is defined as land which is neither Crown land nor the subject of a Crown grant or native grant (i.e., grant of land by native owners), but includes land granted to a " mataqali " under Section 19 of the Ordinance.

[11] But permission is not required for the mortgage of a lease—a dangerous practice in the case of illiterate peoples. It is not clear if consent is required for a transfer to a foreclosing mortgagee. If it is, the resulting uncertainty may lead to confusion and the exaction of exorbitant rates of interest.

rights and the removal of timber and forest produce. Licences are not subject to "The Land (Transfer and Registration) Ordinance."

The Board may set aside any portion of native land as a Reserve, and no land in any Reserve shall be leased or otherwise disposed of except to a Fijian. Thus, while all land not included in a Reserve will be available for leasing to applicants of any race, within a Reserve no one but a Fijian will be entitled to hold land. In cases in which the original area reserved appears to be too large for the present or future requirements of Fijians, the Board may exclude any portion of land from a Reserve, permanently or temporarily—but only with the consent of the native owners.[12] On the other hand, the Governor is empowered to set aside land for a "mataqali" or land-owning unit, whose land is, or may be, insufficient for its maintenance. Where a "mataqali" dies out, the Crown retains its right to become the "ultimate heir."

Finally, under the new Ordinance, very wide powers are given to the Governor-in-Council to make regulations for such general purposes as controlling the occupation or the use of native land, regulating the conservation of the soil, and any matters relating to the tenure of land as between natives on native land, regulating the grant and form of leases, and so on. The regulations relating to leases have already been promulgated,[13] and it has been laid down that for leases in properly designed areas in which due provision has been made for roading, commercial and school sites, etc., the maximum term for a lease shall be 99 years. For leases of isolated unplanned areas the maximum term is 50 years, provided that, if during such term the land becomes part of a properly designed area, the lessee shall surrender the lease and shall be entitled to a lease for 99 years. The maximum term for a grazing lease is 50 years, but the Board has power at the expiration of each ten yearly period to resume any portion of the lease, not exceeding one-fifth of the original area, without payment of compensation. For leases in settled areas requiring re-planning and reparcelling, the Board is to divide the leases into zones and fix the term in each zone. But the term must not exceed 30 years after the coming into force of the Regulations. Leases (of whatever kind) for a longer period than 25 years are subject to reassessment of the rent at the 25th, 50th and 75th year of the lease.

The special conditions attaching to agricultural leases are as follows. If the area exceeds 50 acres and the period of the lease exceeds 30 years, the lessee must expend a stipulated sum in permanent improvements within the first five years. Moreover, every agricultural lessee must plant with crops, in a good and husbandlike manner, within the first five years, at least one-fifth of the land suitable for cultivation; at least two-fifths within the first ten years; at least three-fourths within the first twenty years, and for the remainder of the lease. He must manure the land planted, and not allow any part to become impoverished, and he must take such measures to check erosion as may be required by the lessor.

The Native Agricultural Licences (which are issued to Fijians wishing to utilize native lands within a Reserve) grant the sole right of cultivation and residence for a period not exceeding ten years and they prohibit the transfer, assignment or encumbrance of the estate, or any crops growing on it or the proceeds of any such crops, except with the consent of the Board. These are stringent provisions and the prohibition of the mortgage of crops would seem to render the Crop Liens Ordinance *ultra vires*. It is to be observed that these licences allow for the continuation of cultivation on individual as opposed to

[12] In Kenya the Governor is (by the Crown Land Amendment Ordinance of 1938) empowered to vary the boundaries of native reserves, without obtaining the permission of the natives. But he must first obtain the consent of the Land Trust Board or (in the event of the Board's refusal) of the Secretary of State.

[13] The Native Land (Leases and Licences) Regulations, 1940. Council paper No. 31.

communal lines—a policy which, as already noted, was initiated by the Native Lands (occupation) Ordinance in 1933.[14]

As regards improvements, the absence from the Ordinance of general provision for compensation is unusual and has given the appearance of being a concession to the Fijians in return for their surrender of control and of the right to charge premiums for consent. The payment of compensation as a condition of regaining control of their lands has long been one of the chief grievances of the Fijians. There are, however, a number of important provisions for improvements in the Regulations made under the Ordinance. It is laid down (in Reg. 10) that, if a lease is to be sold by public auction, so much of the upset price as is based on the unexhausted improvements[15] made by an outgoing lessee shall be payable to the outgoing lessee. On the expiration of a lease any building erected by the lessee may (by Reg. 34) be removed by him within three months. The lessor, however, has a right of pre-emption over any building and must pay to the outgoing lessee the fair value thereof to any incoming lessee—any difference of opinion being settled by arbitration.[16] Again, when a lease is surrendered, any improvements on the land are deemed to be vested in the Board (by Reg. 36), though the Board may, at its discretion, allow the removal or sale of such improvements by the lessee within a specified period. Finally, it is laid down [in Reg. 21 (4)] that if the lessee does not wish to continue in possession of the lease . . . the value of any unexhausted improvements (including buildings not removed) shall be payable by the incoming tenant (if any) to the lessee. The amount so payable shall be assessed by the Board and shall be based on the value of the improvements to the incoming tenant at the date when his tenancy begins. If within twelve months of the determination of the lease no tenant is willing to lease the land with the improvements, the outgoing lessee shall thereupon surrender all claim to the improvements.

These provisions have been stated in some detail, since the question of compensation for improvements is becoming one of increasing importance in many of the dependencies.[17] It is clearly in the interest of good husbandry that farmers should be encouraged to build comfortable and sanitary homesteads and improve their farms in every possible way. How far the Fijian provisions will work out fairly for Indian lessees remains to be seen.

In conclusion, the main features of land administration in Fiji may be summarized as follows:

(*a*) The comparatively successful reconciliation of the conflicting interests of the three distinct racial groups;

[14] A Fijian who wishes to take up peasant farming can, on application to the district council, obtain a certificate of exemption from communal duties, provided he pays to the chief an annual commutation fee of 10s. An approved applicant is granted rights over a ten-acre farm for a period of ten years. He may be given a small loan from his province, and he receives advice from an Agricultural Officer. Some of these individual farmers are established in new settlements of their own and have started their own co-operative societies. But most of them have remained in close association with their villages. Some of the chiefs have opposed the grant of rights to independent farmers, since these confer legal immunity from communal obligations. *See* J. W. Coulter, *Fiji*, 1941.

[15] The word "improvements" is defined as follows:—Buildings of all descriptions, fencing, furrows, planting trees or live hedges, walls, wells, draining land or reclamation of swamps, road-making, bridges, tramways, laying-out and cultivating gardens and nurseries, waterworks, sheep or cattle dips, embankments or protective works, irrigation works, water tanks, planting of long-lived crops, and clearing of land for agricultural purposes.

[16] Regulation No. 14 prescribes that "upon a reassessment of rent or upon the assessment by the Board of the value of unexhausted improvements on any leasehold, the lessee, if dissatisfied with the calculation of the unimproved value of the land upon which the rent is assessed, or with the assessment of the value of unexhausted improvements, shall be entitled to submit the matter to arbitration."

[17] Some interesting provisions regarding improvements to land in Sierra Leone will be found in the Sierra Leone Protectorate Land Ordinance (No. 16 of 1927).

(*b*) Government intervention to prevent tribes from alienating more land than they can afford to lose;

(*c*) Government intervention to prevent tribes holding up more land than they can beneficially use;

(*d*) Government intervention to prevent native owners from trafficking in land among themselves;

(*e*) The redistribution of land according to the increase or decrease of land-owning groups;

(*f*) The assumption by Government of measures of controlling moneys payable to native owners, in respect of their leased lands (under section 15 of the Ordinance);

(*g*) The principle of granting sole rights of agriculture and residence to individuals, as distinct from their land-owning group;

(*h*) The subordination of private rights in land to schemes of rural development and the maintenance of soil fertility;

and

(*i*) The establishment of local agencies to deal with the administration of land.

The new legislation enables the Government of Fiji to embark forthwith on a long-range scheme of rural development. At the same time it ensures for the native owners the provision of ample lands for their present and future needs, and adequate rents for such of their land as is leased. It should ensure also ample land for settlement, whether by East Indians or Fijians, with security of tenure and guarantees against wasteful cultivation. East Indians will be encouraged to remain on the land and ultimately, when the scheme of development has been put into practice, the length of leases may be extended to 99 years. By placing the administration of land in a Trust Board, instead of leaving it largely to numerous tribes holding varying views, and frequently ill-equipped to make decisions, the legislation should ensure continuity of policy. If it appears to take from the Fijians much of the management of their own land affairs, it should be remembered that, by the creation of local committees, considerable scope will be given to Fijians to take an active part in the local administration of land.

CZECHOSLOVAKIA'S EXPERIENCE WITH P.R.

[*Contributed by* Dr. Ed. Taborsky]

The Czechoslovak Constitution of 1920 adopted for parliamentary elections the principle of proportional representation, thereby departing from the French and British patterns, and inclining rather to the example of the smaller democracies of the European continent. It carried this principle to its utmost consequences. The Czechslovak electoral system took account of almost every hundred votes, and was in this respect most scrupulously just to all parties. No objection was made to it even by the most chauvinistic members of the national minorities. It was a German deputy, then a member of the parliamentary opposition, who as early as 1925 paid to it in parliament this tribute: " The Czech electoral system has a short but splendid past. It is one of the most just electoral systems in existence."

The representative bodies which it brought into existence furnished a very accurate picture of the political groupings in the State as it existed at the time of the elections. It further made the deputies dependent upon their constituents and their electorate to a considerably smaller extent than is the case with the usual type of election based on the majority principle, this all the more so in view of the fact that a considerable number of the candidates secured election only in the second, and sometimes even in the third scrutiny,

which took place whenever all the seats were not filled in the first scrutiny. For in such a case the competing parties had to draw up new lists of candidates including only those who had previously appeared in the lists for the first scrutiny, without, however, paying any regard to this or that electoral district. (These lists were drawn up for the whole area of the State.) Thus the elected deputies and senators were not committed directly to personal gratitude to, and thereby dependence on, their electoral supporters—as for example is the case in France. They were not obliged to pledge themselves so much to the particular demands of their constituencies and even the purely personal wishes of their voters. The M.P. thus became to a smaller degree a political helper of and a ministrant to his constituency, and was able to feel himself more as being a real political servant of the State and the nation as a whole and to dedicate himself more to this object. He was also able to be less of a representative of a given district and of its particular interests and more of a legislator and a guardian of democracy, who was concerned chiefly and before everything with protecting the interests of the State and its community. In this respect Czechoslovak democracy was fortunate in not following the example of its French model, in which the local dependence of M.P.s was carried at times to a preposterous degree. Finally, in Czechoslovakia the proportional system to a certain degree strengthened the party discipline, offering thereby, of course, at the same time the party leaders much greater protection against the risk of a defeat at the polls than does the majority system. The leaders, of course, always occupied the first places in multiple lists of candidates. They were thus returned even if the party underwent a defeat, and if not, they got into Parliament on the second or third scrutiny when the outstanding vacancies were filled by those of the unsuccessful candidates who were picked out by the leaders of the party themselves.

As opposed to these advantages which were associated in Czechoslovakia with her electoral system of proportional representation one fundamental defect had to be reckoned with. This system, more than any other institution of the Czechoslovak constitutional order, contributed to the splitting up of political life and to the multiplication of political parties and groups. It provided much greater prospects for the success of small parties at elections, and even for those which were split-off and isolated fractions of greater parties. For it was sufficient for a given party to obtain 20,000 votes in any electoral district of the Republic (which was not, owing to the size of the constituencies, a difficult matter) and there were placed to its credit all those fragmentary votes, however negligible they might be, which it had secured in any part of the Republic. If the figure (with the original 20,000) then amounted to 120,000, it could secure further seats in the second or third scrutiny. The logical consequence of this was that all the parties sought to put forward candidates in as many electoral districts as possible and mostly in all of them. As a result, of course, this fissiparous tendency was only intensified.

The extent of this process of disintegration of party life, which I do not hesitate to characterize as the most fundamental of the otherwise very few defects of Czechoslovak democracy, is evident from the survey of the four parliamentary elections which took place in the Czechoslovak Republic between 1920 to 1938. The number of parties competing for votes oscillated between 16 and 29, of which 7 to 11 were parties of Czechs and Slovaks, while the rest were German and Hungarian. Moreover, the cast votes were so split among the individual parties that a coalition of four, and mostly of five, political parties was needed to form a government which could count on a safe majority in parliament. There was no dominant party at all. The nearest approach to some sort of a leading party was made in the first parliamentary elections in 1920. The Social Democratic Party then secured one-fourth of all the votes and occupied 74 out of the 281 seats of the Lower House which

were then contested. Soon afterwards, however, the party was disrupted by the communist secession and since that time no other Czechoslovak political party has been able to secure the election of more than 46 deputies out of 300. Thus in the government coalition there had to be included at one and the same time Socialists, Agrarians, Catholics (both of which would correspond to the British Conservatives) and at times even Nationalists and Germans. Although under the strong leadership, first of President T. G. Masaryk and then of his successor Dr. Edward Benes, the Cabinet was at all times stable, worked well and on the whole successfully, no British student of constitutional problems, who is aware from his own country's experience of what bi-party or even multi-party government means, need be told of the difficulties which confronted Czechoslovakia in this respect.

It is of course true that, as in other States suffering from the exuberance of political parties, in Czechoslovakia also the real foundation of this evil lay outside the sphere of legal rules. The primary causes of the manifestation must surely be sought elsewhere: in the psychological field, in a pronounced variety of points of view, intensity and differences of feeling and temperament, in a smaller or greater measure of individualism, in the differences of social structure, in national and religious heterogeneity, etc. In Czechoslovakia there came into account: first, national heterogeneity, which in practice almost trebled the number of parties; secondly, the absence of an established party-political tradition. (The foundations of the Czechoslovak party system in the modern sense of the term were first laid only in 1900, and the war and the national revolution in 1918 again completely transformed and revolutionized them); thirdly, the fact that the Czechoslovaks are rather more doctrinaire in their outlook and less phlegmatic in sentiment than the Anglo-Saxon peoples; fourthly, to a certain extent the remains of religious divisions. But *the principle of proportional representation helped greatly to strengthen and enhance the disintegrating influence of these essentially social causes* of party exuberance through the fact that it accorded to even the smallest parties a maximum prospect of attaining their aims: the securing of seats.

It has been sometimes pointed out, it is true, that under Austria-Hungary, when elections to the Austrian Reichsrat and the provincial diets (Landtage) were made according to the majority principle, there were also a considerable number of political parties in the Czech Lands after 1900. A closer scrutiny of all the imperial and provincial elections of that time reveals, however, that up to 1907 an absolute majority of all the Czech votes was always secured by one party, first of all the Old Czech Party and from 1891 the Young Czech Party; and that even afterwards the mass of the votes was shared always by only three and at the most four political parties, while the other parties always secured only a quite negligible number of seats. Further, the electoral results for the first years of party-political formation, and this under foreign domination, cannot properly be compared with the conditions of the Czech and Slovak parties in the liberated Republic.

CO-ORDINATION OF ALLIED ENEMY PROPERTY DEPARTMENTS

[*Contributed by* MAX MEYER, ESQ., LL.B., Counsel to the Dutch Ministry of Trade and Industry.]

ECONOMIC warfare can be compared to one of the legs of a triangle symbolizing the military, economic, and psychological aspects of the present struggle for survival and liberation. Interconnected though it may be with both the other legs of this triangle, economic warfare has quite independent and distinguishing features of its own. Its long-range purpose—though this is not always clearly stated—is, on the one hand, to deny the opponent access to those materials,

means, and markets which might facilitate the reconstruction of his armament and other heavy industries and to break the economic stranglehold he holds on his allies and satellites and, on the other hand, to strengthen the economic position of the victors.

In respect to time, economic warfare does not coincide with military operations. It precedes the outbreak of armed hostilities. By the same token the concluding of an armistice or of a peace treaty need not be coterminous with the cessation of economic warfare.

As military disarmament follows in the wake of military defeat, so in its final consequence economic disarmament has to be exacted from the vanquished.

The Allied trading with the enemy laws have yielded a series of potent weapons to hamstring effectively open and camouflaged economic penetration by the enemy. These weapons can be easily adapted to destroy his economic influence altogether and for ever. The resources captured from the enemy and which are at present under the administration of Allied property agencies can at the same time be made available as permanent assets to the victor countries.

At the outset it has to be pointed out, axiomatically, that, because each of these agencies is the creation of its own national sovereign, its powers are territorially limited to a similar extent as the powers of their creators ; in other words the jurisdiction of each agency is co-extensive with the jurisdiction of its sovereign over subjects and residents and over tangible and intangible property actually or by way of legal fiction within the territorial boundaries. Intangibles like patents, trade marks, participations, securities, money claims, and other contractual relationships are among the most valuable assets of the enemy within Allied jurisdiction. For the application of the rules of trade with the enemy the controversial issue of the situs of choses in action has been solved in this way that such situs is deemed to be within the jurisdiction of those authorities to whose compulsion either the obligor or the obligee can be subjected. Hence follows that legal relationships may simultaneously be subjected to the control of agencies of different nationality, dependent upon the contacts with the respective local jurisdictions these relationships exhibit.

This double or sometimes manifold control may lead and in many cases has already led to the anomaly that each agency steers its own independent course without heeding the interests of its fellow-agencies. A further disturbing element is introduced in this picture, in so far as the basic definitions of enemy and enemy property in the Allied legislative and administrative measures are not identical and differ in many respects. Moreover, the administrative practice of the several enemy property authorities does not always run in the same or similar grooves.

A German subject, e.g., who according to the Netherlands Trading with the Enemy decree is an enemy national may for all practical purposes be treated by the American administration as a non-enemy.

The territorial jurisdictional limitation of the enemy property instrumentalities and the variegated definitions of enemy and enemy property are apt to cause a haphazard heterogeneous treatment of enemy property. And, what is worse, these deficiencies of a purely legalistic nature may lead to embarrassing conflicts among the Allied governmental agencies and the aftermath of this interplay of competing forces may well be that valuable resources are wantonly squandered or destroyed.

This article does not pretend to give an exhaustive survey of all points of friction. Its scope is merely to present some of the most striking and typical problems which have already arisen or which are likely to arise in the near future, and to advocate an efficient co-ordination of the activities of the Allied enemy property administrations in a truly international fashion so as to avoid jurisdictional frictions and to utilize the captured enemy assets to their best advantage.

Bank Deposits.—A typical situation replete of explosive material is exemplified

by the following. The XYZ Bank of Amsterdam, a corporation duly incorporated and existing under the laws of the Kingdom of the Netherlands, maintains a dollar-checking account with the National City Bank of New York. This account is partly made up of assets of the XYZ Bank itself and consists partly of funds held for the account of its customers. Let us assume that these customers are Dutch nationals and enemy subjects resident in the Netherlands, in enemy territory, or in neutral countries. In accordance with the American Foreign Funds Control Regulations this account has been frozen since May 10, 1940, the day of the invasion of the Lowlands, and has since then been subject to the control of the U.S. Treasury. The Netherlands Government temporarily residing in London has promulgated a Royal Decree of May 24, 1940 (generally known as the Royal Decree A 1), pursuant to which title to all claims collectable abroad and owing to residents of occupied Netherlands territory is vested in the government. In a series of lawsuits conducted in the New York courts this vesting decree has been characterized by the New York courts as constituting the Dutch Government a conservatory trustee on behalf of its nationals to prevent the enemy from looting the foreign assets of the Netherlands. Though the U.S. State Department recognized this decree to a certain extent (in so far as it assented to giving precedence to the Dutch Government's proprietary title in derogation of claims of third persons which claims had no substantial contacts with the forum) the U.S. Government refrained from allowing the transfer of the accounts in question to an account of the Dutch Government or to deblock these accounts on behalf of that government, each of which steps would have been the logical consequence of a full recognition of the government's title. It need not be argued that this situation might engender a clash of conflicting interests.

The British Government recently has gone much farther than the U.S.A. and has put at the disposition of the Netherlands authorities, under certain conditions, the machinery of the British Custodian so as to enable them to supplement their nominal title with actual possession ; a saving clause, however, has been inserted with respect to assets of which it might become apparent that they are enemy-owned. This reservation has been inspired by the same motives which induced the U.S. Treasury to issue its Regulation No. 17. This regulation imposes upon the nominal owners of accounts with American banks the duty to disclose the names of and other information as to the beneficial participants in these accounts. If such disclosure leads to the discovery that a certain amount of a bank account is being held for the account and on behalf of a Dutch national resident in Holland whose American property has been vested by the American Alien Property Custodian, because he allegedly acted as a cloak or dummy of an enemy, the paramount question will be whether the A.P.C. or his Dutch counterpart has the exclusive or final say as to the enemy character of this national. It can easily be discerned that when the Dutch agency declares the national to be free from enemy domination, whereas the American agency pronounces the contrary, a serious conflict arises. In case both agencies agree upon the enemy character of the beneficiary, then the paramount question will be which jurisdiction is entitled to confiscate these assets, the jurisdiction where the assets are located or the jurisdiction of the residence of the owner.

Corporate Entities.—The case gets even stronger when for the Dutch national referred to at the end of the previous section a Dutch corporation is being substituted which has its commercial domicil in Holland and which allegedly or in reality is dominated by enemy nationals or is acting as a cloak or dummy for enemy interests. The assets of this corporation in the U.S.A. are subject to vesting by the A.P.C. In the first place there can be divergence of opinion between the American and the Dutch authorities, whether the corporation is actually acting as a cloak or dummy for enemy interests. In the second place the Dutch Government has promulgated immediately after the liberation of a part

of its territory legislation to the effect that all enemy dominated or infested corporate entities are to be purged and are to undergo a surgical operation so as to amputate the gangrened members of the corporate bodies. Enemy nationals, who are members of the board of directors or who are officers of a corporation, are forbidden to exercise their functions and are promptly dismissed. Similar provisions apply to Dutch nationals who are members of the Dutch Nazi movement or its affiliations. Title to corporate shares, debentures, and other claims, owned by enemies, is automatically vested in the state and no specific vesting order will be required. Assets belonging to Dutch nationals who are members of the Dutch Nazi movement or its affiliations are put under the administration of a government agency which has extensive authority to manage, liquidate, and sell these assets. An elaborate scheme has been devised to test the integrity of the ownership of securities and the pertinent legislation is replete with safeguards against trickery and camouflage. Once a corporation has been purged it ceases to be an enemy or quisling-controlled corporation and its activities as a smoke screen for enemy interests have come to an end.

It is clear that the purged corporation with the assistance of its national government will immediately take the necessary steps to obtain a divesting order with respect to its American assets. How will the A.P.C. react to such a request? And what will be the consequence if he refuses?

Up to now we dealt only with bilateral conflicts, but a multilateral conflict in which clashing interests of more than two countries are involved should not be discounted. The following is an example of a case in the corporate field where interests of no less than four countries are concerned. The XYZ Bank of Amsterdam maintains on behalf of its customers a securities account with the National City Bank of New York. This account contains a certain number of identifiable share certificates in a Canadian corporation which belong to a Frenchman resident in Holland. The U.S.A., Canada, Holland, and France all have a stake of some sort in this matter and no lofty flight of the imagination is necessary to see that this situation might become the breeding ground for a number of conflicts.

Patents.—A patent is a grant of the sovereign for the monopolistic use of an invention and as such it is territorially limited and protected only within the boundaries and in the fora of the granting state. An important invention is being patented simultaneously in several jurisdictions and hence with respect to such invention each of the patents is subject to a different set of legal rules. Economically, however, those patents form one aggregate exploitation object.

The territorial limitation of the powers of an alien property agency defines his restrictions as to the expropriatory vesting of an enemy-owned patent, i.e., each custodian can only vest a patent granted in his own jurisdiction. The corollary of this doctrine which separates legally what is one and indivisible economically is that the seizing of the several patents by the competing enemy property custodians will result in a breaking up of the aggregate patent structure. Un-co-ordinated and separate transfer of each vested patent in each jurisdiction will cause a substantial diminution of the value of the patent structure and will give rise to cut-throat competition and to conflicts among the buyers or licensees of the diverse patents. Such policy may even lead to a complete destruction of the value of a patent, especially when the buyer or licensee lacks the means to develop it commercially.

A complicating factor in this subject matter is injected by the discriminatory treatment meted out by the American A.P.C. to patentees, resident in enemy-occupied territory. The A.P.C. has vested all these patents, whether they are of importance for the common war effort or not. Though it is intended to return these patents to the original patentees after the liberation of the occupied territories, the policy of the A.P.C. with respect to these patents does not differ

substantially from the confiscatory treatment reserved for enemy-owned patents, and has already given rise to many complaints and protests. The American Government has publicly announced that as to enemy-owned patents no return to the original owners shall take place and that the vested patents will remain available for the American industry. It may be expected that the other Allies will pursue a similar policy as to enemy-owned patents vested or to be vested in their jurisdictions. The need for a homogeneous treatment of these enemy resources and for a pooling of the most valuable patents, so as not to break up the aggregate patent structure to the detriment of the Allied common weal, appears to be paramount.

Conclusions.—It is submitted that the Allied governments in order to co-ordinate their economic post-war strategy take the following measures:

1. Unification of legislation and administrative practice in the field of economic warfare.

2. Exchange of all pertinent information among the allied enemy property authorities as to the assets of enemies and as to enemy-infected property.

3. Adoption of the principle that competent to decide the preliminary question of enemyship is such national agency to whose jurisdiction the enemy national, dummy, or cloak is subject because of his domicil or residence within the jurisdiction, or in case of corporations and similar bodies because of their commercial domicil within the jurisdiction. On principle such agency is to be charged with the administration of the enemy estate as a whole, the other agencies acting as its representatives.

4. Establishment of Mixed Arbitral Tribunals, organized on a bilateral or multilateral basis, to decide bilateral or multilateral issues.

5. Creation of an Interallied Enemy Property Office to be charged with the pooling of enemy-owned patents, trade marks, and copyrights, with the exploitation thereof and with their final alienation as economic aggregates so as to avoid the squandering of valuable assets. The proceeds to be distributed to the Allied nations or to be put at the disposition of some international reconstruction administration. This office can also be employed for locating, administering, and disentangling Allied property found in enemy territory proper. A further task of this office might be the devising of a scheme for an equitable distribution of all proceeds of confiscated enemy property among the Allies, independent of the fortuitous circumstance that a jurisdiction is able to seize and expropriate enemy property in inverse order to its own war expenditure or losses.

The United Nations are in this war for better, for worse, and an equitable sharing of the losses and profits of their joint venture is the logical and unavoidable sequel of their union. In this spirit the above suggestions are being submitted.

INTER-AMERICAN BAR ASSOCIATION

THE Third Conference of the Inter-American Bar Association was held in Mexico City from July 31 to August 8 when the representatives of Canada were The Hon. D. L. McCarthy, K.C., and Senator L. Moraud. The Conference brought together some 600 delegates representative of 19 American countries. Their deliberations covered a multitude and variety of questions including a number more political than legal in character. Mr. McCarthy has presented a full report of the proceedings to the Canadian Bar Association and has kindly placed it at our disposal. After referring to the financial situation of the Association, he reports another matter requiring special mention, and that is the establishment of a school of International and Comparative Law at Havana, Cuba.

This subject was mooted at the first meeting of the Association in Havana in 1941, but owing to war conditions nothing definite was accomplished. The

Cuban Government have now made a very substantial grant. The University of Cuba have taken the matter in hand, and it is now definitely settled to proceed with the establishment of the school. The first meeting is to be held in Havana on January 14, 1945, when all the distinguished international lawyers in both North and South America are expected to attend. A printed circular giving all the details will shortly be in circulation and copies will be sent to all the Provinces in the expectation that scholarships will be offered both by law schools and universities to encourage young men to take advantage of this opportunity of completing their studies in Spanish and French and in International and Comparative Law, which should fit them for the diplomatic service.

In the preparation of the report the compilers had the assistance of Lieut. J. S. Macdonald Langlois whose knowledge of Spanish was particularly helpful in the interpretation of the speeches. The discussion upon the form and scope of an international organization included a paper read by Lic. Vejar Vasquez, former Secretary of Education of Mexico, on the inter-American organization in the post-war. He proposed to the committee the following dispositions: (1) The organization of an inter-American union possessing four fundamental organs: an assembly or conference, periodic consultative meetings of the foreign ministers of the various American countries, a governing board, and a permanent secretariat. (2) The creation of four auxiliary organizations: the inter-American organization of justice and international law, the inter-American economic and financial organization, the inter-American organization for social progress, and the inter-American organization of intellectual co-operation. (3) That the inter-American union be not only a theoretical concept but that it become a reality based on the human psychology of the nations of the new world. (4) That an effort should be made to co-ordinate the activities of the higher world plane with those continental organizations. This to be done in the following manner: the American states being individually represented in the World Assembly ; the Latin American states being granted three seats in the World Council as had been tacitly agreed upon by the League of Nations ; and finally, that both world and inter-American organizations should reciprocally establish a permanent delegation of a technical character. (5) That every effort should be made in order that in this co-ordination of world and continental activities the same general norms above-mentioned should be accepted.

International Judicial Organization.—The delegates of the post-war committee having discussed in the larger sense the problems of world organization, then turned their attention to the judicial aspect of this international superstructure. All the proposals put forward had envisaged the necessity of a World Court and whatever debate did take place on this subject dealt with the form and jurisdiction of this proposed court. Mr. R. Coudert, President of the American Society of International Law, and Mr. J. W. Ryan, of New York, emphasized the fact that an international system could not be effective without the existence of an international court, the latter being an exponent of a decentralized, interrelated, international court of justice.

The most detailed contribution on this subject was that of Mr. Amos Peasley, of New York. He proposed that the lawyers of the world should immediately endeavour to set up a system of interrelated, international courts. He suggested that the protocol of the pre-war permanent court should be revised so as to permit the establishment of additional permanent international courts and the acceptance of obligatory jurisdiction by all nations. He mentioned that there were several ways in which such interrelated, international courts could be created. There might be an expansion of the present plan of separate chambers of the Permanent Court of International Justice. The world might be divided for the purpose of judicial administration into several regions, each containing a number of permanent courts with a defined jurisdiction and with appeal *de jure*

to the World Court. There might be an international circuit court in each national capital. The Permanent Court of International Justice might become the supreme body of the complete system, a body which would in the future exercise original jurisdiction in limited classes of cases as, for instance, those involving the rights and obligations of nations, as such, as distinguished from claims brought by nations on behalf of their nationals. It would have appellate jurisdiction *de jure* in controversies in which the original jurisdiction would lie with the regional courts or other commissions.

The Peruvian delegation went still further, in specifying that there should exist an American Chamber of the Permanent Court to deal with the questions arising from principles of American international law which principles are not yet accepted by the universal community. Such would be issues relative to the Drago doctrine, the Calvo Clause, the Estrada doctrine on Recognition, Diplomatic Asylum, etc. From the decisions of this Chamber there would of course be appeal to the World Court.

Several other proposals were made dealing with this question of an international court of justice, notably that of Lic. Genaro Fernandez McGregor. It is of interest to note that all these proposals were unanimous in their determination to grant to the new Permanent Court obligatory jurisdiction. It was agreed to refer this matter, together with the larger one of international organization, to a special committee which should report on the matter to the Fourth Inter-American Conference to be held at Santiago, Chili.

Codification and Unification of Law.—In order to facilitate the work of the International Court it was suggested by several delegations that international law should be codified. Mr. Ryan of New York, advocating this measure, stated that " a code of general principles should be impartially formulated and agreed upon by multilateral treaty which would be broad enough in scope to deal effectively with and settle at an early and readily controllable stage disputes which heretofore had been regarded as non-justiciable."

This measure, after a short debate dealing with the methods of codification, was referred to the same above-mentioned special committee for further consideration.

Diplomatic Protection and the Calvo Clause.—The conference did not limit itself, however, to the formulation of an international new order, but also turned its attention to certain practices which seemed to give rise to abuses undermining the international structure. One of these abuses which had always been uppermost in the minds of the Latin American delegates was that derived from the practice of diplomatic protection. In the opinion of the latter the institution of diplomatic protection had been all too often used to justify a subtle form of intervention in the internal affairs of another state.

This sentiment was expressed in two papers: one by Dr. Toribio Esquivel Obregon, one of the senior members of the Mexican Bar, whose work was entitled " Diplomatic Protection of Citizens Abroad," the other by Dr. Alfonso Garcia Robles of the secretariat of External Affairs of Mexico, entitled " Diplomatic Protection, the Calvo Clause and the International Rights of Man." The former, in a lengthy paper, after relating the history of the Claims Commissions between Mexico and the United States, went on to condemn the practice of diplomatic protection, concluding : (1) That the nations have neither the right nor the obligation to protect the commerce of their citizens abroad nor to guarantee that part of national capital which shall be employed in it, including licit profits which the commerce produces. (2) The nations have neither the right nor the obligation to protect the citizens resident in other countries with reference to the property acquired therein, whether it be movable or immovable property. (3) The nations have neither the right nor the obligation to protect their citizens with reference to their property even though they have expressly reserved this

right to ask for this protection in connection with the possession or the use of same.

No debate on diplomatic protection could take place without bringing in the question of the Calvo Clause. In order to ensure equality between nationals and aliens it has long been the practice to insert in a private contract one or more of the following provisions: either that the claimant will under no circumstances seek diplomatic aid or that aliens, party to the contract, will be considered as citizens of the local state for purposes of the contract.

As stated above, Dr. Alfonso Garcia Robles read a very important paper on this subject. His proposal was to the effect that diplomatic protection should be substituted by the international protection of the rights of man and that practical measures should be taken to make effective the principle of equality of the foreigner with the national in the case of countries enjoying an equal status of civilization. He pointed out that many countries had already introduced into their domestic legislation dispositions relating to this subject. This clause has even been introduced into the Constitution of some of the Latin American Republics. This, however, he deemed not sufficient and advocated that it was necessary that this principle should be internationally approved. He added that his position was in line with a resolution adopted at the second Inter-American Conference of lawyers held at Rio de Janeiro last year, and he terminated by proposing the adoption of the following resolutions:

1. That it advocate the substitution, in world affairs, of International Protection of the Rights of Man for the " Diplomatic Protection of Citizens Abroad," the latter to be transitorily retained pending the adoption of an appropriate international system for the application of the former, but only in clearly-defined cases of denial of justice strictly construed, and specially provided for in treaties or conventions to which the claimant and respondent States are parties.

2. That it be declared, more specially as regards the Americas, that the nations of this Continent, " due to the similarity of their republican institutions, their unshakable longing for peace, their profound feelings of humanity and tolerance and their absolute adherence to the principles of International Law, of equal sovereignty of the States and of individual liberty free from religious or racial prejudice " have attained a similar " reasonable standard of justice " which renders diplomatic protection unnecessary in their case, inasmuch as between States fulfilling said condition, it is a universally accepted principle, without a single dissentient, that equality of rights with nationals is the utmost to which an alien can aspire.

3. That efforts be made to get the American Republics, as the first step toward total and explicit abolition, by treaty, of diplomatic protection, to subscribe two continental conventions, subsequently transformable into world agreements, sanctioning therein respectively the integral validity of the Calvo Clause—which is nothing more than a legal formula to achieve practical application of the principle of equality of rights mentioned in the preceding paragraph—and the irresponsibility of the State for damages to alien residents by reason of or during civil wars.

There ensued a rather heated debate on what was to be understood by the expression " denial of justice " and " international standard of rights." Several delegates held that the Calvo Clause had already received international sanction in the adoption of article 9 of the Convention on The Rights and Duties of States, Montevideo, 1933, which stated " The jurisdiction of states within the limits of national territory applies to all inhabitants. Nationals and foreigners are under the same protection of the law and the national authority and the foreigner may not claim rights other or more extensive than those of nationals." It was also held that in the North American Dredging Co. case the validity of the Calvo Clause had been upheld.

At the close of the discussion on this question it was decided to transmit to all member Bar Associations the matter in question in order that each one might report upon it at the next conference.

Racial Discrimination.—On treating diplomatic protection it was alleged that the nations to-day had reached "a reasonable standard of justice" that excluded all religious or racial prejudice. It was therefore normal that this very question of racial prejudice should come up on the tapis.

A motion was introduced by Judge John Gutknecht of Chicago in the name of the National Lawyers Guild of the United States. It stated:

The third Conference of the Inter-American Bar Association resolves that:

Whereas it is a fact that discrimination by reason of national and racial origin is practised in sections of the Americas and particularly in the United States, and

Whereas such practices are essentially violations of basic human rights and tend towards distrust and disunity; and

Whereas the best interests of all the peoples of the Americas will be best served by the total elimination of every form of such discrimination;

That practices of racial discrimination be strongly condemned and that possible steps be taken to ameliorate and eliminate them.

Several other motions were presented in the same vein. Some of them went even further and suggested that this principle be implemented by a system of sanctions able to assure the disappearance in the new world of certain local practices of segregation. The Peruvian delegation proposed that a disposition condemning discrimination toward social groups in any form or expression should be introduced into the Penal Codes of all countries. This the nations of the world would bind themselves to do by means of an international treaty.

In the meeting of the Council these resolutions were put aside as being of political character. They, however, arose once more at the plenary session and the Assembly finally adopted the following resolution:

The Third Conference of the Inter-American Bar Association resolves that practices of racial discrimination be strongly condemned and that positive steps be taken to ameliorate and eliminate them.

The Peruvian proposal was to be submitted to each Bar Association for further consideration.

The political matters which came under discussion created a good deal of controversy and at one stage necessitated a statement by the Canadian representatives that pursuance of political subjects would involve their withdrawal from the Association.

The final resolutions included in the section of Legal Education a recommendation that observations on the teaching of Comparative and International Law be sent to the Law of Faculties of the Law Schools of the Americas. In order to assist these studies the Law Schools were invited to use their influence to encourage the study of English in Latin-America in preparation for Law Schools and in North America the study of French, Spanish or Portuguese. A further recommendation contained a proposal to draw up a programme for the teaching of Commercial Law based upon an examination of the Commercial Legislation in the different States.

In another section it was decided to notify all the Governments of countries of the Americas, Law Schools affiliated to Universities, and Cultural Institutions that may be interested, of the creation of the Inter-American Academy of Comparative and International Law and requesting an economic collaboration for the same. It was also proposed to organize an Institute on Comparative Constitutional Law. There was also a recommendation to the respective Bar Associations for the establishment of a permanent Institute in each country of

America for the study of the Uniformity of the Civil and Commercial Laws with a permanent director and an adequate body of members.

The resolutions dealing with the constitution of an International Organization as finally approved by the full meeting were as follows:

" RESOLVED, That the Inter-American Bar Association endorses as a primary peace objective the establishment and maintenance, at the earliest possible moment of a universal international system, with judicial, legislative and executive functions based on moral and juridical principles and on the internal experience of all nations and adapted to the requirements and limitations of international co-operation."

Now therefore, consistent with and in further development of the principles and purposes so declared and supported in the foregoing resolution—
Be it resolved that the Inter-American Bar Association at its Third Conference held in the City of Mexico, D.F., on August 7, 1944, declares itself to favour the following principles and programme in general terms, namely:

1. That a permanent international organization be established by the nations to maintain peace by the prevention and suppression of aggressive war.
2. That this permanent international organization should include a general assembly in which all of the nations shall be equally represented.
3. That the permanent international organization should include a permanent executive agency to administer the business of the organization between sessions of the Assembly. The members of the Executive Agency shall be designated by the Assembly.
4. That the general international organization include the existing Permanent Court of International Justice, with the necessary adaptation of its Statute to the new organization, and the Court should be empowered to create chambers, special or regional, as need arises, and
5. That the Assembly have power to create from time to time such inferior courts as may be necessary.

Resolves : That the endeavour be made to have the following proposals put into practice:

That the Permanent Court of International Justice must continue to exist, linked to whatever political agency be set up after the war. It would have compulsory jurisdiction over all juridical disputes between States, in matters relating to their respective rights. Said jurisdiction would be exercised at the request of any State a party to the dispute. However, should the parties involved in the controversy agree to resort to some other procedure for peaceful settlement, the Court would have no jurisdiction until after such procedure had been exhausted without reaching a settlement of the conflict.

When drafting the statute of the Court its jurisdiction would be broadened as much as possible.

The conclusion reached by the Canadian representatives upon the whole proceedings was contained with a tribute to the hospitality which they enjoyed in the following paragraphs.

The success of the Third Inter-American Conference was in large part due to the fact that the lawyers of the continent did not hesitate to face the complex problems which confronted them. As has been amply demonstrated in the first part of this report, the post-war committee proceeded directly to grapple with those questions foremost in the minds of all thinking men. At its close it had drawn up a comprehensive constitution for the world of to-morrow which included

not only an Executive and an Assembly, but also a World Court with obligatory jurisdiction and a code of international laws.

It was inevitable that in this moment of crisis controversial political issues should arise. The Conference, however, did not retreat before the challenge, but preferred to air these questions before establishing a categorical precedent to the effect that political issues, whatever be their nature, were to be considered *ultra vires,* a precedent which is a good omen for the future work of the Association. In order to implement this decision the Council adopted a resolution interpreting the objectives of the Association in the light of the above-mentioned *ultra vires* pronouncement. This step marks a new era in the history of the Inter-American Bar Association which will hold its next Conference in 1945, at Santiago, Chili, under the Chairmanship of Dr. Oscar Davila, its newly elected President. Up to now the organization has been in its embryonic stage, but this Conference has had a decided maturing influence on it. It has given the organization an opportunity to prove both its viability and its essentially organic nature.

NOTES

Lord Atkin.—The association of Lord Justice Atkin with the Society began in 1924 when he consented to accept the office of Vice-Chairman, under the Chairmanship of Sir Albert Gray. Upon his initiative the Treasurer of the Honourable Society of Gray's Inn was approached with a view to an annual grant being made to the work of the Society. The valuable financial assistance resulting from a favourable response was followed by similar action of the other three Inns of Court, and also of the Law Society. Although only the last-named has been able to maintain the grant during the war, the support accorded by the four Inns has been an important contribution to the financial stability of the Society. Upon the death of Sir Albert Gray, Lord Atkin became Chairman of the Society, and held that office until 1933, when he was obliged to resign under medical advice. At the same time, however, he showed his continued interest in the work of the Society by inviting Lord Macmillan to be his successor and by continuing his own attachment as a member of the Committee. Shortly before his retirement the Lord Chancellor had invited him to become the Chairman of the Committee to consider the organization of Legal Education in England. In the course of their deliberations they had to discuss proposals for the establishment of an Institute of Legal Research, which involved the question of the means of obtaining the necessary material for research work. They envisaged the desirability of establishing a large central library completely equipped with the law books of all the ages. That subject has engaged the attention of the Society since its formation, and was originally put forward in a definite form in a special article on Comparative Legislation in *The Times* of December 26th, 1907. Arising out of that article it was proposed by Mr. Sidney Webb in a communication to the Society that as such a comprehensive ideal seemed to be impossible of accomplishment there should be a combined catalogue of the principal law libraries. This proposal was considered by Lord Atkin's Committee to be "one of the first steps in promoting legal research" and "a matter of importance to the whole Empire and indeed to lawyers of all nations." Subsequently this latter suggestion was referred to a Committee of which Lord Macmillan is Chairman, but their deliberations have been suspended by the war.

In connection with the recommendation to found an Institute, it has been observed "that an Atkin Institute of Legal Research would be a worthy memorial of a lawyer whose boldness of exposition and clarity of enunciation of fundamental principles were the living embodiment of those methods of legal education with which it might be associated for all time." (*Quarterly Review,* Vol. 282, p. 426.)

Professor A. Berriedale Keith.—In Professor Berriedale Keith the *Journal* of the Society has lost a most valuable contributor. Much of the material in his books dealing with the Constitutional position of the British Empire originally appeared in its pages. The particular contributions, with which his name has been associated since 1920, were the notes on Imperial Constitutional Law supplied with unfailing regularity, which gave a leading place among the faithful contributors supporting the Society's work. Keith had a keenly critical mind which could detect possible defects in either official documents or judicial decisions with equal impartiality. His early experience as an official in the Colonial Office led him to derive a particular satisfaction from handling material issued under its auspices. Nevertheless, Keith had a masterly grasp of Imperial problems, and worked with a celerity and brilliance which stimulated envy while leaving no hope of emulation. He took over a section of the *Journal* which had previously been supplied

by several contributors, and it will be difficult indeed to fill the gap caused by his loss. His knowledge was encyclopaedic, and extended far beyond the subjects with which his name is known by his works. He could supply, for example, particulars of cricket and bowling averages, and in such matters he kept his information up to the latest available date.

Parliamentary Control of Delegated Legislation.—The article of most general interest and of the first importance in the latest *Journal of the Society of Clerks-at-the-Table in Empire Parliaments* (1941) is that by "Onlooker" on "Parliamentary Control of Delegated Legislation" (pp. 83-91). To anyone who has practical experience of the drafting of Acts of Parliament and also of subordinate legislation it appears self-evident that delegated legislation cannot be avoided, even if one were to admit that it should be avoided wherever possible. I would not make such an admission for the reason that much delegated legislation is concerned solely with administrative details of which Parliament as a body has no knowledge, and with which it has not in any event the time to deal.

Following the lead set by the Parliament of the United Kingdom in the Emergency Powers (Defence) Act, 1939, the Parliament of New Zealand, in the Emergency Regulations Act, 1939, gave to the Governor-General in Council practically the same powers to make regulations as are conferred on His Majesty in Council by the United Kingdom Act. Almost equally extensive powers, though expressed in more general terms, were conferred during the last war by the War Regulations Act, 1914. The practical difference lies, not in the extent of the powers conferred, but in the extent of their exercise. During the last war, notwithstanding the existence of the power to make regulations, the following matters, *inter alia,* were dealt with by statute, *viz*:—The creation of an Expeditionary Force (first by voluntary enlistment and later by conscription); Trading with the enemy; Enemy contracts; Regulation of trade and commerce (with power to requisition goods and services required in the prosecution of the war); the registration of aliens; the acquisition of land by aliens; voting of members of Expeditionary Forces for purposes of parliamentary and other elections. During the present war, special legislation has not been passed in respect of any of these matters, but all of them and many other matters have been dealt with by emergency regulations. This is not, in itself, a condemnation of the procedure adopted.

While engaged in writing this notice, I read the remarks of Mr. Herbert Morrison (reported to-day in a message from England). He is reported as saying "Let those who are so jealous of the right of Parliament to discuss every administrative detail of every measure remember what used to happen before the war. Guillotine of the time-table is a far more deadly instrument for crushing Parliamentary discussion than any system of delegating to the Executive the power to settle matters of detail." He concluded his remarks with a plea for more delegation of detail to the Executive, leaving Parliament free to deal adequately with broader principles of policy.

If a proper distinction were always drawn between details and principles, no valid exception could, I think, be taken to the rule formulated by Mr. Morrison. I doubt, however, that it would be contended even by the Executive that, for example, regulations imposing liability to conscription for service overseas deal only with matters of detail.

Much of the local criticism of delegated legislation (ordinary as well as emergency) seems to be based more upon the *quantity* than upon the *nature* of that legislation. Comparison is made between the *size* of the annual volume of statute-law and the *size* of the annual volume of regulations (not made under the statutes of the year but under the whole body of statute-law). This kind of criticism is obviously beside the point. What is required is that there should be an examination of the subject-matter, with a view to determining what should have been dealt with by Parliament and what could properly have been left to the Executive. If such an examination were carried out by a competent authority (not necessarily or even preferably a Parliamentary Committee), its criticisms would have some weight, but general criticism, not based on a knowledge of details, can be and usually is ignored. I know of no instance where an emergency regulation or any other regulation has been revoked or altered as a result of public or Parliamentary criticism founded on principle. If criticism is to be effective it must be informed and then sustained. Even sound criticism is ignored unless it is importunate.

In theory, a device to secure consideration of regulations by Parliament is to require their confirmation or validation by statute. This device was adopted in New Zealand by the Agriculture (Emergency Powers) Act, 1934-35. This Act was passed to enable effect to be given to the far-reaching recommendations of a Commission of Inquiry set up to inquire into and report upon the dairy industry of New Zealand and upon matters incidental and relevant thereto, and to make recommendations as to legislation required to promote the interests of persons engaged in that industry and "the general economic welfare of New Zealand." The matter was considered urgent; the legislation was experimental; and the recommendations were in general and not in specific terms. Authority to make regulations to give effect to the recommendations of the Commission was conferred, by the Act above referred to, on the Governor-General in Council. But, in order to

preserve Parliament's control of the exercise of this general and wide authority, it was provided in the Act, not only that the regulations should be laid before Parliament, but that the regulations so laid before Parliament in any session should expire on the last day of that session if they were not, during the session, expressly validated or confirmed by statute. The result has been that in every session since the Act was passed a validating measure has been passed, almost, if not entirely, as a formality. I do not suggest that, in fact, any improper use has been made of the power, but merely that effective Parliamentary control depends, not on legislation, but on the eternal vigilance of members of Parliament.

In conclusion, I would suggest as a practical remedy for many of the evils to be found in delegated legislation, that regulations (including in that term all the various forms of delegated legislation) should be framed with the same particularity and care as are used in the framing of statute-law, and that, so far as practicable, they should be drafted by the same officers. Objectionable features in regulations are often due to the fact that they are the work of officers who are not trained in the work of drafting or in the critical examination of proposals submitted for legislation. An experienced draftsman can often satisfy all the actual requirements of a department concerned in the promulgation of regulations, without offending against constitutional or other principles, though, left to its own devices, the department, not from malice but because of unfamiliarity with the recognized rules, might err grievously in this respect. My proposed remedies are:

(1) That delegated legislation should be framed by officials experienced in the art of drafting;

(2) That all delegated legislation should be scrutinized by a competent body;

(3) That when criticism is expressed, in Parliament or elsewhere, it should be informed criticism;

(4) Lastly, that informed criticism should be sustained until it is taken notice of by the Executive.

J. Christie.

Philadelphia Conference. — The International Labour Office have issued in a single number of their Official Bulletin the declaration, recommendations and resolutions adopted by the International Labour Conference at its session in Philadelphia in May, 1944. It includes the reaffirmation of the fundamental principles on which the organization is based, and recognizes the obligation to further among the nations of the world programmes which will achieve full employment and the raising of standards of living and the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being. It is recognized that the means of attaining this end includes facilities for training and the transfer of labour, including migration for employment. The Conference appreciated the economic implications arising from their labour policy, and concluded by affirming that the principles set forth in this declaration are fully applicable to all peoples everywhere, and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as those who have already achieved self-government, is a matter of concern to the whole civilized world.

The first set of recommendations adopted by the Conference dealt with the subject of income security, and laid down guiding principles for schemes to include social insurance and social assistance. Whatever may be the particular aspect of legislation requiring attention, these guiding principles and the illustrations given under them are bound to be of assistance both to legislators and draftsmen. The subject of income security includes also recommendations concerning medical care comprising the essential features and form of the general service which are occupying the attention of so many legislative bodies throughout the Empire and will do so to an increasing degree in countries beyond it.

Special attention was paid in the recommendations to the minimum standards of social policy which might be accepted in dependent territories. In that connection there came under consideration problems arising from the recruiting of workers and the continuance of national service which might seem to have an element of compulsion in it. The same section also dealt with the employment of women, young persons and children, which, as will have been observed in recent issues of the Review of Legislation, has been receiving attention from the legislators of the Colonial Empire.

The Conference made a useful series of suggestions in reference to the organization of employment in the transitional period from war to peace. These recommendations envisaged the constitution of an employment service for the adequate organization of labour supply as well as the possibility of the national planning of public works.

The status of the International Labour Organization and its further development received consideration, and raised a certain amount of argument and public comment. The practical point upon which there appears to be an agreed measure of public support is that an organization with the status analogous to that of the International Labour

Organization is capable of promoting a larger measure of international action than one which consists of political representatives, even if they have technical advisers. It would appear that on this point the Government of Great Britain has not progressed to the same extent as some others, although participating in the work of analogous bodies, which have been created for the effective prosecution of measures due to commitments of the war.

Legal Reform in Abyssinia.—Abyssinia, or Ethiopia, as it is now officially termed, has, with the exception of Egypt, constituted for a longer time a separate territorial State than any territory in Africa or, one might add, in Europe. Its traditional Kings go back to Solomon,[2] and its more established succession takes us back at least to the early Christian era. Sharing this pre-eminence with Egypt, it shares also with her a Christian ecclesiastical tradition of a similar antiquity, and, but for the Muslim conquest of Egypt, the two countries could undoubtedly during long centuries have been drawn into close association. This reflection may perhaps give some support to Dr. Hanna Saba's plea in a recent number of *L'Egypte Contemporaine*[3] that Egyptian collaboration should be sought in the work of establishing a new and modernized legal system in the liberated country. The unity of faith between Egyptian Christians and the majority of the Abyssinian peoples may indeed suggest that such collaboration would have its value, but of this it is difficult to judge without local knowledge. As regards Abyssinian Muslims, it is to be noted that by Proclamation 12 of 1942[4] Kadi's Courts with a superior Sharia Court of Appeal were established for the determination of questions of family law (marriage, divorce, etc.) and wills and successions of Muslims, as also questions regarding Wakf and gifts where the endower or donor was a Muslim. This is in full accord with Egyptian practice, and presumably follows an established custom in Abyssinia.

Dr. Saba gives a sketch of the foreign jurisdictions existing in the country prior to the Italian conquest. European residents were few indeed until recent years. One recalls that remarkable man, James Bruce of Kinnaird, who spent some years there as far back as 1770, and whose detailed and exciting description of his strange experiences are given in his voluminous *Travels in Search of the Sources of the Nile.* In Bruce's day the country was already falling a prey to the ambitions of rival chieftains—the so-called *Rases*—from amongst whom emerged finally the ill-fated King Theodore, who perished at Magdala in 1868.

A Treaty between Great Britain and Ethiopia in 1849 seems to have created a certain consular criminal jurisdiction over British subjects, but it appears that it was not until 1908 that permanent (French) consular courts were established by the Franco-Abyssinian Treaty of that year. The arrangement as to civil and criminal jurisdiction thereby made followed the customary system in vogue in Egypt prior to the establishment of the Mixed Courts. Other consular courts, Dr. Saba tells us, adopted since 1908 the principles laid down in the French treaty as the basis of their own jurisdiction. It is noteworthy that as late as 1928 Italy contracted for the same benefits in a treaty "of friendship" with Abyssinia.

The Italian conquest involved sooner or later the suppression of the consular jurisdiction, though it appears that no formal notification to that effect was given by the Italian Government. Happily the Italian occupation proved to be of unexpectedly short duration. After the reconquest an agreement (January 31, 1942) was made between the British and Ethiopian Governments, by Art. 5 of which it is provided that "jurisdiction over foreigners should be exercised by the Ethiopian courts according to the draft statute attached hereto as an Annex." This Annex is termed "Draft Administration of Justice Proclamation," and the first number of the Official Gazette of Ethiopia (March 30, 1942)—the *Negarit Gazeta* published in Amharic and English—repeats the Annex as a Proclamation. By this Proclamation there are established (1) a Supreme Imperial Court, (2) a High Court, (3) Provincial Courts, (4) Regional and Communal Courts. The Supreme Court consists of the "Afa Negus" as President together with two judges of the High Court. This latter has full criminal and civil jurisdiction. It is fully constituted when it comprises three judges. The total number of judges is left to the Royal discretion, by which the number of British judges is also to be determined.

In 1943 a further Administration of Justice Proclamation lays down a body of Court Procedure Rules applicable to all proceedings in the High Court and Provincial Courts.[5] These rules are clearly of British inspiration.

Art. 21 of the Administration of Justice Proclamation, 1942 (following the Annex above mentioned), establishes a Consultative Committee for Legislation, comprising the Judicial Adviser, the President of the High Court and three other persons having recognized legal qualifications. This committee drafts laws and revises drafts. No law is to be submitted to the Emperor for enactment unless accompanied by a certificate signed by

[2] The Emperor of Ethiopia is still officially termed "The Conquering Lion of the Tribe of Judah," and whatever the truth of the ancient tradition, the existence of the Falasha shows some early association with Palestine.
[3] *L'Egypte Contemporaine*, Nos. 212–213, pp. 355ff.
[4] *Negarit Gazeta*, April 30, 1942.
[5] *Neg. Gaz.*, October 31, 1943.

a majority of the members of the committee, certifying that it is not repugnant to natural justice and humanity and is a fit and proper law to be applied to Ethiopians and foreigners alike. The committee is obviously designed to be a potent instrument of law reform and a security against any infringement of foreign interests.

Under the Agreement of 1942 the Emperor requests and accepts the services of British advisers, police commissioners, judges, etc., and agrees not to appoint other advisers except after consultation with the British Government.

In conclusion it is pertinent to remind one's readers of the valuable survey of the law of slavery in Abyssinia by Mr. Gardiner published in Part IV of the 15th volume of this *Journal*, third series (November, 1933), and to add to that survey a reference to the reform effected by the Slavery (Abolition) Proclamation, 1942.[6] By this Proclamation the legal status of slavery is declared abolished, slave-dealing is made a capital offence, and any person preventing a slave (i.e., presumably a person formerly a slave) from asserting his freedom, or recapturing one who has asserted his freedom, is punishable with imprisonment up to five years and/or a fine not exceeding 1,000 M.T. dollars.

McNaghten Rules.—In an admirable survey of the operation of the McNaghten Rules during the century since they were enunciated, Mr. H. Barnes includes in the *Cambridge Law Journal* (Vol. VIII, No. 3) the particulars of the legislation and decisions in other countries upon the defence of irresistible impulse:—

" In the United States of America the defence of irresistible impulse began to be discussed some time before McNaghten's case was tried. In 1834 Wright J. said, ' If he had power to forbear or to do the act he is responsible.'[7] Then Birchard J., ' Was the accused a free agent in forming the purpose to kill? '[8] Shaw C.J. said ' and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming force of mental disease, his intellectual power is for the time obliterated. . . .' "[9] It is not very clear what the Chief Justice meant, and, according to the Report, the jury returned and asked him what degree of insanity would amount to a defence. In 1869 it was said, " Man, under the influence of disease, may know the right, and yet be powerless to resist the wrong."[10] By 1886 the defence was being more readily and clearly accepted. Somerville J., " There must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (i) Capacity of intellectual discrimination; and (ii) Freedom of will." " There cannot be, and there is not, in any locality or age, a law punishing men for what they cannot avoid."[11] These cases are but a few of many examples: in all, seventeen of the States of the United States of America have adopted the irresistible impulse defence.[12]

The law of South Africa (approved in the Report of the Committee on Insanity and Crime[13]) was declared by Lord de Villiers: irresistible impulse is a defence if caused by mental disease, and it is a question of fact whether power of control has been lost.[14] The necessity for mental disease was emphasized later, " an impulse which, by reason of mental disease, he is unable to resist."[15]

The Criminal Code of Queensland, 1899, s. 27 (quoted with the approval by the Commission on Insanity and Crime),[16] adopted the defence of irresistible impulse " or of capacity to control his actions." This was adopted in the Western Australian Code; and, somewhat more elaborately, in the Code of Tasmania: " When such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist." New South Wales, South Australia and Victoria abide by the McNaghten Rules. An effort made in Victoria in 1936 to extend the Rules by judicial interpretation failed.[17] So Australia splits on the irresistible impulse defence, three States each way.

The defence of irresistible impulse has made considerable headway in countries which have no connection with the McNaghten Rules. France, Penal Code, 1810, Art. 64: " There is neither crime nor offence if the accused was in a state of mental alienation at the time of doing the act or if he was constrained by a force which he could not resist." From the point of view of psychiatry, the words " etat de demence " seem rather wide. The criticism applies to the definitions of insanity in most Continental Codes. Germany,

[6] *Neg. Gaz.*, August 27, 1942.
[7] *State* v. *Thompson* (1834), Wright's Ohio Reps., at p. 622.
[8] *Clark* v. *State* (1834), 12 Ohio, at p. 495.
[9] *Comm.* v. *Rogers* (1844), 7 Metc. (Mass.) 500.
[10] *Bradley* v. *State* (1869), 31 Ind, 492.
[11] *Parsons* v. *State* (1886), 31 Ala. 577.
[12] Weihofen, 15.
[13] 1923, Cmd. 2005, p. 9.
[14] Hay (1899), 16 Cape of Good Hope (S.C.), 290.
[15] Smit. (1906), T.S. 783.
[16] 1923, Cmd. 2005, p. 9, 24.
[17] Sodeman [1936], 2 All. E.R. 1138; for a full discussion, see Barry, Insanity in Criminal Law of Australia; *Can. Bar Review*, 427; or English Studies in Criminal Science Pamphlet, 8–12.

Criminal Code, 1871, s. 51: "There is no punishable act if at the time of doing it the actor was in a state of unconsciousness or of disturbance of the mental faculties which excluded free determination of the will." Hungary, Criminal Code, 1878, s. 76: "The act cannot be imputed to him who did it whilst in a state of unconsciousness or whose mental faculties were disturbed and who was thereby deprived of the faculty of determining his will." Switzerland, Code, 1916, s. 12: "is incapable of comprehending its wrongfulness, or of acting in accordance with such comprehension." The Russian Imperial Criminal Code, 1903, s. 39: "or control his actions." The Penal Code of the Soviet Republic, 1926, Art. 11: "Measures of social defence of a judicial-correctional character cannot be applied to persons who have committed crimes in a state of chronic mental disease or of temporary derangement of the mental faculties, or in any other condition of illness, if they were unable to realize the significance of their acts or to control them, or who, although they were in their right senses at the time of the act, have been attacked by mental disease before the passing of the sentence. To such persons measures of social defence of a medical character only can be applied." This is a good example of co-operation between the lawyer and the doctor. Many medical men in England are irritated not so much by an insane person being convicted, as by belief that punishment is not the best treatment for him.[18]

Mr. Barnes concludes that the main objection to the defence of irresistible impulse is the difficulty of proof or disproof. But difficulty, he urges, has never been a bar to litigation; why should it be to a criminal defence? He finds that almost the only valid argument for leaving matters as they are is the very weak one that the existing safeguard for revision of convictions of persons suspected of being insane are such that no real danger exists of an insane person being hanged or otherwise punished. It would seem that the dislike for the law's deficiencies has now spread to juries, so that if they persist in recognizing the defence of irresistible impulse the legislator or the courts may be forced through pressure of public opinion to recognize it as well.

Parliamentary Procedure in New Zealand.—Volume X (for 1941) of the *Journal of the Society of Clerks-at-the-Table in Empire Parliaments* contains several articles that are of interest to readers of the *Journal of Comparative Legislation*. Of particular interest is the illuminating description of parliamentary procedure in New Zealand, given by Mr. Hall (the Clerk of the House of Representatives).

The authority for Mr. Hall's observations on the immediate operation of Resolutions in Ways and Means for the imposition of additional customs and excise duties is to be found in s. 284 of the Customs Act, 1913, which provides in effect that when any such resolution has been passed no person shall be competent, before the end of the session, to commence any proceedings on any ground that would not have been a sufficient ground for such proceedings if the resolution had possessed the force of law as an amendment of the Customs Acts. This provision safeguards Customs officials in the collection of duties in accordance with the resolution; if, by reason of any change of policy, the resolution is not confirmed by statute during the same session, all duties paid in terms of the resolution, unless payable otherwise than in accordance with the resolution, are refunded.

Mr. Hall also deals in his article with the vexed question of the relative powers of the House and the Legislative Council in relation to "Money Bills" (including in that term not only Bills that impose taxation or appropriate public moneys, but also Bills that involve "even slight additional expenditure"). Such Bills can properly originate only on a recommendation from the Crown (that is to say, in practice, on a message transmitted to the House by the Governor-General. No member of the House (not even a Minister of the Crown) is competent to move any amendment in a money bill if the adoption of the amendment would involve any additional expenditure whatever. It follows that any amendment made by the Legislative Council in a Bill transmitted to it by the House is subject to the same restrictions, but it is suggested that the Speaker of the House might be more conscious of the rule in applying it to a Legislative Council proposal that seemed to infringe the privileges of the House than he would be in the case of a borderline amendment moved in the House itself and obviously acceptable by the House. Where a suggested amendment is beyond the sphere of doubt, the procedure is that the Governor-General, acting on advice, transmits a further message incorporating the terms of the amendment.

The problem is common to all bicameral legislatures, and it would appear from Mr. Du Toit's article on "The Financial Powers of an Upper House: A South African Experiment" (pp. 145-156) that it assumes greater proportions in South Africa than in New Zealand.

J. CHRISTIE.

[18] They have not been brought up in the belief of Baron Bramwell in the effectiveness of punishment.

Commorientes.—The principle of s. 184 of the Law of Property Act, 1925, has achieved some popularity in Canada. Thus it has been adopted in Manitoba,[19] New Brunswick,[20] Ontario,[21] Prince Edward Island,[22] British Columbia,[23] Nova Scotia,[24] and Saskatchewan[25]. Yet the rule laid down is arbitrary. It accords well enough with probability when both the victims are of mature age, but hardly so when one is an infant and both are drowned or caught in a fatal fire, nothing further being known. In any case dogmas on questions of fact, barring further enquiry, are not to be welcomed in any department of thought. Their value, such as it is, arises solely from the closing of controversy.

From this aspect the decision of the Court of Appeal in *Peacey* v. *Grosvenor*, 60 T.L.R. 124, has considerably reduced this value in the case of s. 184. We are now told that the section only applies if the Court is satisfied that the proper inference from the circumstances is that the deaths took place consecutively. If the two deaths resulted from the explosion of a bomb, and the victims were together, this inference cannot, we are told, be drawn, and we are left with the odd conclusion that the deaths were simultaneous. Luxmoore L.J. dissented. His dissent provokes sympathy. The probability, even the possibility of simultaneous death is surely remote. Our perception of differences in time, like that of differences in space, fails at a point, but this difference exists in fact and does not, with all respect to Goddard L.J., as he then was, thereafter become a metaphysical conception. It remains a physical fact. Proof of true simultaneity is impossible, and the presumption in favour of consecutive deaths is strong. If the legislator has thought fit to establish a dogma and bar controversy, it seems undesirable that the Courts should whittle it away by introducing a somewhat subtle distinction in its application. The question is not properly a legal one, it concerns the estimate of probabilities of fact. As such, it may be regretted that the Court did not give the section its full application as, one may surmise, the legislator intended.[26] F. M. G.

Income Tax in Great Britain and the Dominions.—In the minutes of proceedings of the annual meeting of the Canadian Bar Association of 1943, which has just reached this country, there is an address by Mr. Molyneux L. Gordon, K.C., from which may be made the following extracts:—

"Income tax was first introduced into England by Pitt in 1797 to provide funds to defeat Bonaparte. The Act was amended in 1803 and again in 1806, and was dropped after the Battle of Waterloo. It was re-introduced in 1842, and in 1853 Mr. Gladstone publicly stated that he proposed to abolish the tax because he confessed himself unequal to the equitable enforcement thereof."

"Prior to the Great War income tax was levied to a very modified extent in some of the Dominions. For instance, in most parts of Canada there was a municipal income tax. In Australia there was a State tax. Shortly after the commencement of the last war it became necessary to raise large sums for defence, and the various Dominions, big and little, imposed an income tax. In Australia the Act was passed in 1915, in Canada 1917, in India 1922, and in South Africa 1925."

"All these Acts sprang from the same root and retained most of the features, and in some cases the precise language, which appeared in the early English Acts of 1797 and 1806. It is impossible to understand the Canadian Income Tax Act without considering the history of English legislation and studying the cases which have been decided in the other Dominions."

"There are sixty-eight volumes of Income Tax reports containing 40,000 to 50,000 pages, and these volumes cover most of the cases decided in the British Empire. Probably more than 2,000 of these decisions will be useful in interpreting the Canadian Act. Decisions from other parts of the Empire are particularly interesting, because you can obtain complete coverage of certain branches of business which are not common in Canada. For instance, money-lending is a major activity in India, and almost every question in regard to bad debts has been decided by the Indian courts, and quite a percentage of these cases have reached the Privy Council. South Africa is rich in minerals, and many questions as to the taxation of mining profits, the promotion and organization of companies, and the buying and selling of options have been thoroughly discussed. The Income War Tax Act has been considered by the Canadian courts on seventy occasions. The Department has been successful in forty-five cases, lost twenty, and in five cases the honours were divided. The Canadian judgments refer to and usually follow cases decided in England and other parts of the Empire."

"The original Act failed to mention depreciation or obsolescence. The first mention of obsolescence in England appeared in the statutes of 1926, but in Canada we are still

[19] *Jour. Comp. Leg.*, Third Series, xxv., p. i, 68.
[20] *Ibid.*, p. 71.
[21] *Ibid.*, p. 75.
[22] *Ibid.*, p. 77.
[23] *Ibid.*, xxiii, p. ii, 51.
[24] *Ibid.*, xxv., p. i, 73.
[25] *Ibid.*, xxvi, p. 38 and see also p. 53 for its adoption in Queensland.
[26] For subsequent cases the Courts of First Instance betray no anxiety to take advantage of the loophole provided by the Court of Appeal. See *Howard* v. *Treasury Solicitor*; Collins, J. (*The Times*, February 10, 1944); in re *Mercer*; Morton, J (*Times L.R.*, ix, p. 487).

further behind. The Canadian statute does not mention the subject except with reference to munition plants."

"It was not until 1878 that any reference was made in the English statutes to depreciation.[27] In that year the following amendment was passed:

> Notwithstanding any provision to the contrary . . . the commissioners shall . . . allow such compensation as they think just and reasonable as representing the diminished value by reasonable wear and tear in any year of any machinery or plant.

This provision is somewhat similar to section 6 (n) of the Canadian Act, which reads:

> In computing the amount of the profits and gains a deduction shall not be allowed in respect of depreciation except such amount as the Minister in his discretion may allow.

The question of depreciation has been before the courts on nearly a hundred occasions, and the only way to find out the amount the Minister should allow is by studying the principles laid down in these cases."

"In 1797 only 25 per cent. of the inhabitants of England could read. There is no estimate of the number of persons who could write, which is a horse of an entirely different colour. And the number of people who could keep books must have been very small. Most people who kept books kept them on a cash basis. That is to say, they put on one side the cash they received and entered on the other side the amounts paid out, and the difference was their taxable profit. Consequently no provision was made in the 1797 Act to cover bad debts, but a section was inserted in the 1806 Act which reads as follows:

> No sums shall be deducted from any debts except such debts or such parts thereof as shall be proved to the satisfaction of the commissioners to be irrecoverable and desperate.

This provision is somewhat similar to section 6 (d) of the Canadian Act, which reads:

> In computing the amount of the profits and gains a deduction shall not be allowed in respect of amounts transferred to a reserve account except such an amount for bad debts as the Minister may allow.

These sections have been before the courts on nearly seventy occasions, and to illustrate the importance of examining these decisions I would refer you to the Gleaner case,[28] which was decided by the Privy Council in 1922. In that case the court held that once a debt was written off it could not be taxed if subsequently collected, whereas the present practice in Canada is to credit the debt in the year in which it is received."

The next point to be remembered is that most modern business activities were not even thought of at the time the Act was originally introduced. Company and insurance law was in its infancy, and methods of doing business have almost entirely changed. Yet the principal features of the Act remain the same and are incorporated in the Canadian statutes. As Lord Macmillan stated[29]:

> The Courts have had to resort in many cases to artificial interpretations in order to make the Acts work and to prevent injustice.

"The man who drafted the original Act specialized in the use of words with more than one meaning, and has arranged these words in sentences of the greatest ambiguity. As an example of this sort of thing I refer to the clause in the 1797 Act which levies tax on annuities and other payments of like nature, being of certain annual amounts. The definition of income in the Canadian Act includes:

> Annuities and other annual payments received under the provisions of any contract.

"The Courts have held:

(1) that the words "annual payments" include weekly payments;[30]
(2) that the words include any payment made in any year;[31]
(3) that the words do not include debts paid by annual instalments;[32]
(4) that if an instalment of capital includes interest the payment must be analysed and the interest taxed.[33]

"No statute has been subject to so much judicial criticism. I would refer to the judgment of Lord Wrenbury, who stated:[34]

> If it were competent to a Court of Law to censure the legislature or if any useful purpose could be served by censuring the legislature of 1842 or 1853, no censure could be too strong, I think, for having expressed an Act, and that a taxing Act, in language so involved, so slovenly and so unintelligible. . . . As a member of the Joint Committee of both Houses to which was referred the Consolidation Bill which is now the Income Tax Act 1918, I strove to find some way in which we could deal with the language of confusion and unintelligibility of the Acts to be consolidated. . . . The Act of 1918

[27] (1878), 41 Vict., c. 15, s. 12.
[28] *Gleaner Co., Ltd.* v. *Assessment Committee*, (1922) 2 A.C. 169.
[29] Report of Codification Committee.
[30] *In re* James Settlement, (1918) 2 Ch. 54.
[31] *Scobye* v. *The Secretary of State for India*, (1903) A.C. 299.
[32] *Martin* v. *Lowry*, (1927) A.C. 312.
[33] *Beck* v. *Howard de Walden*, 23 T.C. 382.
[34] *Great Western* v. *Bater*, (1922) 2 A.C. 1.

> therefore reproduces the old language with all its faults and has done little more than improve matters a little by some rearrangement. . . . The law of income tax which now so vitally affects the subjects of the Realm ought, as speedily as possible, to be expressed in a new statute which should bear and express an intelligible meaning.

And the judgment of Lord Sumner, who stated:[35]

> It is a most wholesome rule that in taxing the subject the Crown must show that clear powers to tax were given by the Legislature. Applied to income tax, however, this is an ironical proposition. Most of the operative clauses are unintelligible to those who have to pay the taxes, and in any case derive such clarity as they possess from the judges who have interpreted them."

The words spoken by Lord Sumner are only too true. A study of the Income Tax Act will repay the labour involved, but such study will not throw much light upon the subject unless the reader has also examined the cases which indicate the proper meaning to be given to the actual words contained in the Act, and the more you read the more you will realize how frequently this meaning differs from that currently in use.

The next important thing to remember is the fact that the principles to be applied in calculating taxable income are in a general way set out in the Act of 1806, and these principles have, with few exceptions, been introduced in the Canadian statute. The Acts do not state clearly what should be included and what may be deducted, but specifically forbid certain deductions, and the rest has been left to the judges, who have used their discretion in regard to almost every conceivable item. In other words, in order to prepare a proper financial statement for income tax purposes you first have to adopt opinions which were in force one hundred and fifty years ago and then see how they have been modified by cases which have been decided since the Act was enforced.

It has been frequently stated[36] that the modern financial statement does not correctly show the amount of profits subject to tax, and the reason for this is quite evident. There is still in existence a directory of the City of London, dated 1799, which lists eleven persons as accountants, and at that time the word accountant was usually employed to describe a bookkeeper and not a person who audited accounts for others. Undoubtedly the science of accountancy has made great strides in the last hundred years and many changes have been made during that period, but the Act has remained the same, so that many settled principles of accountancy have to be disregarded in calculating taxable profits, because these principles have been improved and modernized in the past hundred years, and wherever such improvements differ from the provisions of the Act they ought not to be applied.

In every profit and loss statement there are two questions to be solved. The first question is whether any particular payment is of a capital or income nature. This is entirely a question of law, and one which depends upon very fine distinctions.

The next thing to be done is to consider what items of expense may be deducted. In the English Act of 1806 it was provided that:

> No sum shall be deducted from the profits or gains for any disbursement or expense whatever not being money wholly and exclusively laid out for the purpose of such trade.

The Canadian Act provides:

> A deduction shall not be allowed in respect of disbursements or expenses not wholly, exclusively and necessarily laid out for the purpose of earning income.

If you apply these words literally, practically every deduction and expense would be prohibited. Let us first deal with the word "exclusively." You may occasionally use the telephone on your desk to tell your wife that you won't be home for dinner. Apparently any such use would prohibit the deduction of the whole expense. Your stenographer might write a personal letter and the same ruling would apply. The tax inspector might come into your office and claim that a new piece of machinery was not necessary and you could get along with the old. No one should get the idea that these words are a dead letter. They are perhaps the most important and objectionable words in the Act. In 1942 the Supreme Court of Canada disallowed the deduction of $2,282,679.42 which had been expended by the Montreal Light Heat and Power Consolidated in refunding the bonds issued by that company at a lower rate; judgment proceeding on the ground that the money was not expended for the purpose of earning the income. I am inclined to suggest that these words should be entirely eliminated from the English language and an amendment inserted in the criminal code inflicting heavy penalties for their use. But I cannot overlook the fact that the interpretation of these words has caused more litigation than probably any other three words in the English language and formed a steady income for members of the legal profession for nearly one hundred and fifty years, and will continue to do so as long as they are retained in the Act.

Workmen's Compensation.—The law relating to Workmen's Compensation has been almost as universally adopted among the English-speaking peoples as the Sale of Goods Act. Introduced originally in England in 1897, it has for nearly half a century provided

[35] *National Provident* v. *Brown*, (1921) 2 A.C. 222.
[36] See, e.g., *Gresham Life Assurance* v. *Styles* (1892), 25 Q.B.D. 60.

a method of compensation to workmen for industrial injury by imposing a liability on the employer, which he has covered by insurance. The workman has to make his claim, and steps to enforce it may be necessary in a court of law. For a variety of reasons which are generally well known this has led to a considerable volume of litigation. The law, together with the changes adopted and proposed in it, are briefly surveyed in a memorandum issued by the Minister of Reconstruction (Cmd. 6551). In addition, the proposals put forward by Sir William Beveridge in his report, which regarded the existing system as being " based on a wrong principle and dominated by a wrong outlook," are discussed in the memorandum. The Government are in agreement, and accordingly have put forward proposals in which compensation for industrial injury is to be attached to the general scheme of Social Insurance without actually forming an integral part of it.

The details as regards the benefits to be paid and the method of financing the scheme are contained in the memorandum, which is of interest to all countries where the existing type of legislation is in operation.

Having regard to the extent of the social security legislation as already in operation in New Zealand, reference may be made to an article by Professor Lipson of the University of New Zealand on how social security works in the Dominion, in the latest issue of *Public Administration* (Volume XXII, pages 74-86). There he observes that " workmen's compensation is taken care of by the labour code, and has not been consolidated into the social security system as the Beveridge plan proposes. Nor does the Dominion give any marriage or funeral grant on the lines suggested by Beveridge. Apart from these exceptions, the New Zealand measure does incorporate relief for all the major hazards, or assistance in all the critical moments, that are likely to befall a citizen."

The present position is: " Legislation passed in 1943 now compels all employers to insure their firms against their legal liability for accidents to workers. The machinery of administration is handled by the Labour department, and, should a disputed claim develop into a court case, it is sent to a Compensation Court specially constituted in 1939. Before his compensation is settled, however, an injured worker may need immediate financial aid. At this point the Social Security department steps in, granting either a sickness or an emergency benefit, subject to means test, to tide him over. If compensation is later forthcoming from the employer, the Social Security department recovers the amount of the benefit. The suggestion that workmen's compensation be merged with the rest of the social security system has not been bruited here. Nor would it be likely to find support among the workers, since through the Compensation Act they receive in general a higher remuneration than under social security benefits at current rates."

The Conflict of Tribal Laws.—Mr. Julius Lewin contributes to the *South African Law Journal* (August, 1944, Volume LXI, page 269) a valuable examination of the difficulties arising from the conflict of tribal laws. They are due to the fact that there is to-day only a slight body of law common to all the Bantu-speaking tribes of the Union. The bulk of Native law recognized and applied in the special Native courts is tribal law and custom known to and observed only by the people of a particular tribe or possibly group of related tribes. When the transactions between people were confined to fellow-tribesmen, no conflict of laws in the sense of private international law arose. The Union Parliament has made an attempt to solve these complicated problems by enacting a single simple rule in the Native Administration Act, No. 38 of 1927. The provision, which was originally derived from a proclamation issued in 1879, is as follows:—

> " Where parties to a suit reside in areas where different Native laws are in operation, the Native law, if any, to be applied by the Court shall be that prevailing in the place of residence of the defendant."

Mr. Lewin proceeds to give examples of the questions arising for litigation. The first is: If both parties to a dispute are of X tribe, but are living among people of Y tribe, are they deemed to follow the custom of X or of Y? The decision in this case he considers to have been incorrect, as it was contrary to the rule that natives are not deemed to follow their own tribal customs in the absence of agreement to the contrary. The rule is that Natives are deemed to follow the custom of the place where they live, regardless of their own tribal origin. That, however, gives rise to another question, when parties, also both of the same tribe, each live among people of two different tribes. The other possibility is where the plaintiff and defendant belong to different tribes but both live among people of the other tribe. To that, Mr. Lewin replies that where plaintiff is of X tribe and defendant is of Y tribe, and both live where Z custom prevails, Z custom should be applied. This, however, as he points out, begs another legal question. In legal language men never " live " in a place: they are either domiciled or reside in it. Attempts have been made by statute to deal with this difficulty, but Mr. Lewin obviously leans towards a law which would introduce the conception of domicile and so provide a firm basis for applying principles familiar in other jurisdictions in dealing with the conflict of laws. He finds the effect of Native law and litigation struggling to operate in an alien environment has already gone far to deprive Native law of the simplicity and flexibility which were its chief charm under tribal conditions.

Criminal Responsibility.—Dr. Norwood East read a valuable paper to the Medico-Legal Society on the subject of "Responsibility and Culpability" which is printed at length in the *Medico-Legal and Criminological Review* (Volume XII, pages 69-82). Referring to the statement which has been made that the criteria of criminal responsibility are unsatisfactory, he stated that after forty years' close concern with the subject he had no doubt that present procedure and practice result in justice being done to the public as well as to the offenders.

In the course of his paper he referred to the McNaghten rules and gave some account of the practice in other countries, from which extracts may be made, though the paper really requires study at length. He writes: "Zilboorg points out that, although the formula introduced a century ago has been frequently criticized, it has been propagated throughout the Anglo-Saxon world, and has found its way into the criminal practice of England and America, whilst similar concepts prevail in Latin and Teutonic judicial systems. Mannheim reminds us that most continental codes acknowledge an irresistible impulse, explicitly or by implication, as a reason for imputability. Zilboorg believes that the law relating to responsibility is unlikely to alter in the near future. Kinberg observes that even if a serviceable definition of imputability could be made it would be of no use, and would before long be a hindrance in the rational solution of problems connected with criminal responsibility.

Dr. Norwood East adds that the courts of several States in America recognize the rule that punishment should be reduced when the accused is mentally disordered, although he may know the nature and quality of his act and that it was wrong, and is able to control his impulse to commit it. Deutsch reports that this has not been accepted as law in any State in the Union except possibly Nebraska.

"In 1933 the principle of modified responsibility was legally adopted in Germany. The new formulation of the Penal Code stated: 'An act is not punishable when the actor, at the moment of his action, in consequence of mental disturbance, of mental disorder or imbecility is incapable of understanding the awfulness of his action or of acting in accordance with his understanding.' Mannheim asserts that it is commonly accepted that this provision is nothing but a re-statement of a law that had already been in force for several decades, and that psychiatrists, supported by the courts, had succeeded in improving a legal provision, with the result that their view became first unwritten and finally written law. Referring to this formulation, Aschaffenburg states that the alienist Carl Willmanns has opposed its adoption as law on the grounds of the great number of such cases, the difficulty of diagnosis, and the impossibility of treating any case according to its individuality. Aschaffenburg considers that these objections are justified, but constitute no bar to the legal acceptance of diminished responsibility. . . .

"The Swiss Federal Code of 1937 sets out in Art. II: 'If the offender at the time of his act was mentally disturbed or his mental competency diminished, or if he was mentally retarded to the extent that his capacity to recognize the illegality of his act, or his capacity to act in accordance with this insight was diminished, the court in its discretion may impose a less severe penalty.' Art 12, however, provides an exception to Art. II, where the partial responsibility was the result of purposeful action by the offender for the purpose of the crime committed.

"Apart from the question of responsibility or modified responsibility, but rather closely related thereto, is the fact that the courts constantly consider the circumstances of the offence and exercise their wide discretion, except in cases of murder, when deciding the form and length of the sentence imposed."

The second portion of Dr. East's paper was devoted to the question of culpability, from the medical point of view, in which he examined the criteria to be adopted by the medical man and his contribution to the legal proceedings. In doing so he gave the following clear definition of the nature of the evidence required from the medical expert: "The term 'criminal responsibility' is concerned with acquittal on the grounds of insanity, or alternatively with conviction and punishment, and 'mental culpability' with conviction and the degree of blameworthiness, which in cases of minor mental abnormality lies somewhere between that attached to the unlawful act of a normal person on the one hand and one who is insane according to law on the other. If an offender who is responsible in law for his act or omission commits a crime as the direct result of a recognized form of mental abnormality, the psychiatrist may consider to what extent he is culpable, and whether any medical recommendation should be made to the court on his behalf." "It would seem," he added, "that if we are to serve as explorers of fact rather than as mere hawkers of opinions we must approach the subject clinically, classifying our cases according to their mental and psychological reactions and avoiding abstruse speculations."

Legislative Procedure.—When Bagehot wrote his essay on Parliamentary reform, his chief topic was the electoral franchise. Mr. R. S. W. Pollard's pamphlet "How to Reform Parliament" (Forum Press: 2s.) makes a far wider survey. While speculation might confidently name one political party to which he does not belong, he states the

pros and cons with fairness. It is natural for reformers to demand more, rather than fewer, statutes; they are impatient of anachronistic obstructions. Brougham's Charitable Trusts Bill, proposed in 1816, did not become law till 1853. Mr. Pollard would carry over Bills from session to session; he deprecates the delays which private Members' Bills encounter. There will of course be some old-fashioned folk who contend that not all Bills, even those of Private Members, justify a jet-propelled progress, and that, if prorogation is not to kill a bill "freak legislation" has too good a chance. Mr. Pollard favours proportional legislation. He would abolish our obstinately surviving House of Lords and replace it with a variant of a Norwegian model. Like Mr. J. F. S. Ross, whose book on Parliamentary Representation drew attention to the topic in 1943, he has a healthy concern for the quality of Parliamentary candidates; he would render the career of legislators more attractive by giving them proper secretarial assistance, proper office accommodation and, if their constituencies neglect to re-elect them, proper pensions.

It is his proposals for improving the machinery of law-making which will specially interest students of comparative legislation. His major recommendation is one which F. W. Jowett and others have often canvassed—a vigorous system of committees of M.P.s to supervise the activities of each department. The committeemen would learn government at first hand and perhaps contribute something from their own experience and initiative. Mr. Pollard projects them on a scale which might leave members little time to sit in the House. His committees are to examine their department's Bills before introduction, analyse its estimates before the Treasury sanctions them, approve all its rules, regulations and orders before issue, investigate the need of legislation and suggest Bills which the department might sponsor; finally they are to scrutinize the department's administration as a whole and publish an annual report upon its work and policy. His committees would be attended by an under-secretary from the department; they would examine civil servants and "all relevant papers" and hear evidence from outside. Mr. Pollard notes the objection that this counter-attack by the legislature upon the province of the executive might disturb the balance of the constitution and upset ministerial responsibility; but he predicts counterbalancing advantages.

> "In the first place these committees would take the place of most existing Parliamentary committees, official or unofficial. Secondly, the work would be done by more M.P.s than at present do committee work; and finally, the House itself would not need to sit so often."

This proposal that the new committees are "to act in the place of a standing committee stage of the appropriate Bills in the House" is exciting. He wants them to consist of as few as fifteen members; the quorum would presumably be five. Unquestionably a small committee is workmanlike, especially if witnesses are to be examined. But members who are not among the fifteen (or five) committeemen may be eager to discuss the Bill in the House. Sir Courtenay Ilbert told the Whittaker Select Committee in 1913 that a small committee was best for drafting, but, if it ceased to be a microcosm of the whole house, it lost influence through being unrepresentative, and it lost time (if interested members were excluded) because the whole committee stage was repeated again downstairs. It is part of Mr. Pollard's scheme that the report stage be expedited and that the report and third reading be taken on the same day. "I find it very hard," said Mr. Speaker Fitzroy to the Select Committee on Public Business over which Mr. Ernest Brown presided in 1931, "to curtail the discussion on the report when relatively so small a number of members have had an opportunity of moving amendments or speaking on them upstairs."

One of Mr. Pollard's departmental committees is to take over finance. He would then abolish the annual Appropriation Bill, do away with all supplementary estimates, and cut out the financial resolution now required when a Bill is to authorize the expenditure of money. It may be hard to persuade the House of Commons to surrender its existing opportunities of controlling ministerial extravagance (even though the Private Member's pressure nowadays stimulates spending rather than saving) and its traditional use of every chance to criticize the Government's policy and administration. Mr. Pollard further wants the Budget Day debate to be treated as the second reading of the Finance Bill, presumably at that date an invisible document. He would indeed like to substitute for the second reading of all ordinary Bills a resolution commending their principle. This was Balfour's tentative suggestion in 1913; recent debates on White Papers perhaps follow that line. On the other hand, a Government which adopts it may be scolded (as over the Reform Bill of 1867) for unloading upon the House the Cabinet's peculiar responsibility.

Mr. Pollard would like every Bill to have an explanatory memorandum; when the Bill became law this would be revised and sold "as a popular pamphlet explaining the Act"—a good enough plan if the risks of repugnancy are avoided, if judges are not allowed to be severe on the exposition, and if Governments do not use the document as mere propaganda. Lastly, he would have a drafting committee (Mill's "commission of legislation"), composed of several M.P.s, Parliamentary counsel, experienced solicitors and barristers, and one or two High Court judges. It would supervise all Bills introduced "to see that they are in harmony with the previous law and are intelligible"; it would

produce consolidation Bills, promote law reform and codification, arrange for the drafting of amendments at the request of the House, see to the repeal of obsolete enactments and be responsible for drafting Bills when Parliamentary resolutions have approved the principles of proposed laws. It is an ambitious programme. We may agree that its size is no excuse for doing nothing at all. Law reform (already cared for by the Lord Chancellor's Law Revision Committee), consolidation and repeal of obsolete statutes would be something to concentrate upon for a start.

If these comments on Mr. Pollard's pamphlet have been argumentative, the fact is a tribute to the stimulus of his pages. Few observers, whether in the legislative or the executive camp, can contemplate complacently the strain which current legislative demands may impose upon our existing Parliamentary machinery.

C. T. Carr.

Dumbarton Oaks Conference.—The report of the delegates to the Dumbarton Oaks Conference is a disappointing document.

The organization it proposes for the community of nations is the reverse of democratic. This seems strange, considering how the present war has demonstrated the efficacy of democratic methods of government.

The dominating position in the organization is not, as might have been expected, entrusted on democratic lines to a body representative of all the States concerned, and expressing their combined will through laws made by a majority under a system of voting which would allow to each State a reasonable share in the exercise of power. The dominant position is given to a Security Council, which is to consist of one representative each of the United States, the United Kingdom, the Soviet Union, China, and in due course France, as permanent members, and six other States elected by the Assembly for terms of two years. The vital problem of the basis of voting on this important body is left as a note of interrogation, a statement being appended that the question of voting procedure in the Council, as well as several other questions, is " still under consideration."

A General Assembly is proposed, in which all the United Nations would be represented, but it is put into a position mainly of a " talking shop," with power to " consider," " discuss," and " make recommendations." In this General Assembly it is proposed that the States should vote by a simple, or in some cases a two-thirds, majority, on the basis of " one State, one vote." This, if the Assembly had the supreme power, would presumably give the smaller States a disproportionate share in the control over the policy of the organization. But, so far from its having the supreme power, the Assembly is required to refer to the Security Council, either before or after discussion, any questions on which action is necessary; and it is even precluded from making recommendations, on its own initiative, on any matter relating to the maintenance of international peace and security which is being dealt with by the Council. The main function of importance entrusted to the Assembly is the disagreeable one of apportioning the expenses among the members and approving the budgets of the organization, the requirements of which would of course depend upon the policy pursued and the action taken by the Council.

The Council is to have the primary responsibility for the maintenance of international peace and security, and the members of the organization are all to obligate themselves to accept and carry out its decisions. It is to have the advice and assistance of a military staff committee composed of the chiefs of staff of the permanent members of the Council or their representatives. It is contemplated that special agreements should be concluded among the members of the organization, subject to the approval of the Council, as to the armed forces, facilities and assistance necessary for maintaining international peace and security which they should undertake to make available to the Council on its call. How far such agreements would be likely to materialize seems open to question.

The report leaves unsolved the vital problem of the guaranteeing of justice to aggrieved nations which cannot themselves get just settlements of their disputes by peaceful means. The Council is to be empowered to investigate any dispute or any situation which may lead to international friction or give rise to a dispute, but only in order to determine whether its continuance is likely to endanger the maintenance of international peace and security. If it does so determine, it is to consider whether it should deal with the dispute, and if so whether it should take action under paragraph 5 of Chapter VIII (A), but that paragraph merely says that the Council should be empowered at any stage of a dispute which is likely to endanger the maintenance of peace and security to " recommend " appropriate procedures or methods of adjustment. If any such dispute is not settled the Council is to take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the organization. Self-redress, therefore, is banned, but no other redress is assured.

With regard to economic, social and humanitarian problems, the report proposes that the organization shall " facilitate " their solution and " promote " respect for human

rights and freedoms, and an Economic and Social Council is to be set up to discharge this function under the authority of the Assembly; but there is no suggestion of giving power to the Assembly to make binding laws or regulations for adjusting the divergent interests and views of different nations in regard to these important matters, and removing conditions tending to friction and war, or for organizing collective services.

Looking at the proposals as a whole, they seem to offer little hope of meeting effectively the great need of humanity for the creation of an international organization which will really make an end of war and substitute justice for force as the supreme arbiter of the destinies of nations.

F. N. KEEN.

Unconstitutional Legislation in the States of America.—An English lawyer finds it hard to appreciate the risks run by statutes in the transatlantic courts (whether State or Federal), where the process of judicial review may declare a law to be unconstitutional when it has been in force for many years. To him Parliament is the sovereign authority; as he demands certainty in law, he dislikes the disturbance of agreements, status and rights based on the acceptance of a statute, but he construes legislation *ut res magis valeat quam pereat*: he is generally content to let a statutory dog, however sleepy, lie. An American, brought up in reverence for fundamental instruments not easily revoked, may claim that this process of judicial review of legislation is a triumph of popular control. The formal and permanent will of the people is expressed in a written constitution; the temporary and evanescent manifestation of the people's will is formulated in statutes; the courts (as agents for the people) supervise the work of the legislators (also agents of the people) to make sure that the temporary does not overthrow the permanent. The prevalent American theory, based on the English common law, is that nobody may challenge the constitutionality of a statute unless he is threatened with some injury thereunder to his legal rights. No Government department has the responsibility of watching the constitutionality on behalf of the public; latent injury may go a long time undiscovered unless an individual citizen comes forward.

A publication of Indiana University, "Judicial Review of Legislation in Ten Selected States," by Mr. O. P. Field, records the results of some statistical research into the matter. The selected States are Colorado, Illinois, Indiana, Massachusetts, New Hampshire, New York, North and South Dakota and Wisconsin—old States as well as new, some industrial, some agricultural, some both. The decisions holding statutes to be unconstitutional are those of the State courts, not the Federal courts. The material was assembled by obtaining answers to a "check list" of 43 questions. Was the plaintiff, for instance, in these cases a private citizen or a corporation or a public officer or a State or a city? What was the date of the enactment challenged? What was its general subject? How long was its life? Was there a dissenting judgment? Mr. Field declares that lawyers are slow to use the statistical method. He extends it even to inquiring the number of pages in majority and minority judgments, and he works out the average figures from the answers. He justifies this question by saying long judgments have the effect of befogging the principle at stake; fewer readers make the effort to master the more diffuse statements.

Mr. Field's statistics show that many statutes are attacked but few fall. About 5 per cent. of the Indiana statutes were challenged as unconstitutional; of this fraction 78 per cent. were held valid. North Dakota comes off best of his ten States with 94 per cent. held valid, South Dakota worst with only 56 per cent. In the ten sample States the average life of an unconstitutional statute before being found out is 7½ years. Mr. Field adventurously suggests that there ought to be a time limit for the challenge of constitutionality. The settlement of a constitutional question, he says, is not one of those private rights of men enshrined in the Bill of Rights; "constitutionality is a public problem as well as a private problem." As for the subject of challenged statutes, Mr. Field breaks them down into the following percentages:—government 28, courts (including procedure and civil and criminal jurisdiction) 18, business and the regulation of professions 18, taxes 12, property 8, and labour 3; the residue presumably resist classification. He has something to say on the possible influences of the method of selecting judges (popular election or official appointment), on the significance of an expert drafting bureau where it exists, and on the use of advisory opinions in the different States. There are two policies for the draftsman, he says. Either the principle is "Safety First" or else the apparent object is to push up to the edge of the precipice and thus find out how far a statute can go. The use of advisory opinions is intriguing; our judges resisted stoutly the idea of consultation upon an abstract question of law when the Rating and Valuation Bill was debated in the House of Lords in April, 1928. In Massachusetts and New Hampshire the Legislature can ask the highest tribunal whether a pending Bill violates the constitution. The system seems to work satisfactorily. We hope Mr. Field will elaborate this practice in some future instalment of research into the working of the legislative process.

Books for Foreign Libraries.—The Inter-Allied Book Centre, 3-5, Salisbury Square, London, E.C.4, organized under the auspices of the Conference of Allied Ministers of Education, has been set up to receive books of every kind for the restoration of University, Public and Institutional Libraries on the Continent. In particular modern technical, scientific, commercial and legal works, as well as sets of periodicals, are desired in order to replenish the devastated libraries in Allied countries. The appeal from Professor Sir Ernest Barker as Chairman of the Committee making these arrangements is cordially commended to members of the Society.

Immovables in the Conflict of Laws.—Whatever may be the future of International Law, whether it is to become, as some prognostications seem to suggest, a species of Constitutional Law, or, as a more pessimistic outlook decrees, to survive only as constant occasion for disputes, the Conflict of Laws will continue and its problems still have their present importance. These are not, indeed, so much international as interjurisdictional, and no conceivable alterations in the relations of State authorities would eliminate them. Much, it is to be hoped, will be done in the future by way of simplification, notably by the standardization of the significance of fundamental legal exceptions. Our Courts have, for example, found it possible to break away from the historic but bizarre common law classification of real and personal property in conflict problems. There are indications that the superstitious reverence with which the Common Law was once regarded no longer operates to forbid the adoption in other fields of conceptions of wider acceptation than those of the historic system.

Though at the moment questions of Conflict are not frequently before the Courts it is pleasant to have one's thoughts directed to those more lasting problems than to such as have more immediate urgency in the present harassing circumstances. Dean Falconbridge is always instructive and frequently suggestive, even provocative of controversy. His two essays on Immovables in the Conflict of Laws in the *Canadian Bar Review*, January and June, 1942, are less controversial than that which dealt with Renvoi and Acquired Rights (June, 1939), but they are well worth noting, and the references they contain, to Canadian cases, make them the more valuable. Attention may particularly be drawn to his remarks as to Contract or Equity relating to Land, and to Capacity, Authority and Power. His views as to *Bank of Africa* v. *Cohen*[37] are not identical with those of Dr. Cheshire, though both incline to uphold the decision on other grounds than incapacity to contract. These two articles form part of a chapter in the forthcoming edition of the author's *Laws of Mortgages of Land*. Special attention is, in consequence, paid to conflicts as to the right of mortgagees, as to which some recent Canadian cases of particular interest are cited.

F. M. G.

Erratum.—In the note on Income Tax in Kenya, Volume XXV, p. 84, the judgment in *Commissioners of Income Tax* v. *Errol* was attributed by an error, which we regret, to the Chief Justice instead of to Mr. Justice R. S. Thacker.

NOTICES OF BOOKS

ARGENTINE CONSTITUTIONAL LAW.[1]

The shattering blows which the aggression of Germany has dealt to the political framework of most of the countries of Europe will impose upon them difficult tasks of rehabilitation after the war, and many of them will doubtless take the opportunity of revising their constitutional structure. In no department of the law has the value of the study of comparative legislation been more fully realized than in the sphere of constitutional enactments. The history of constitution-making shows how closely the authors of each new constitution have studied the precedents provided by their predecessors and have sought to benefit by their experience. The proficiency of the British in the art of governing themselves has always evoked admiration and sometimes envy abroad, and many have been the attempts to reproduce our constitutional methods in other countries, not always with conspicuous success, for a nation's constitution is pre-eminently a native growth and does not readily bear transplantation. The Mother of Parliaments must sometimes have been a little startled by the antics of her progeny. But there is much to be learned, if not always to be imitated, from the experiments of others. France, Germany, Italy and most recently Russia have provided the world with leading examples of constitutional codes. At this moment when so many schemes of reconstitution are afoot it is the federal system which is probably being most studied, and of this system the constitution of the United States of America furnishes the leading and most successful instance.

It is therefore not surprising to learn from Dr. Amadeo that when the statesmen of the Argentine in 1853 set about the task of framing a federal consitution for the nation they should have resorted to the United States for their model, though they did not

[37] (1909) 2, Ch. 129; 100 L.T.R. 916.

[1] *Argentine Constitutional Law.* By Santos P. Amadeo. (Columbia University Press, New York, 1943.) Pp. xii + 243. 20/-

slavishly adopt it. "The federation of Holland and of Switzerland served also as examples to our federalism," said Alberdi, the great Argentine lawyer, whose first draft "had a profound and definite influence on the Argentine constitution." The philosophy of Rousseau was also a source of inspiration. But it remains true that "the framers of both the Argentine and the United States constitutions were influenced by the same social and political principles," and in both the conception of the separation of powers is dominant. The present reviewer has before him a volume of the Codes of the Argentine Nation which he treasures as a souvenir of a pleasant meeting with the members of the Supreme Court at Buenos Aires in 1935, a gift embellished with their autographs. The first portion of the volume contains the text of the Argentine constitution, and it is sufficient to glance at the headings of its sections in order to realize how scrupulously Montesquieu's great principle of the separation of the legislative, the executive and the judicial powers has been observed.

Of the evolution and the working of this code Dr. Amadeo provides a clear account. The historical narrative is brief but adequate. It is, however, with the juridical aspect of the constitution that the author, as an eminent member of the Law Faculty of the University of Puerto Rico, naturally most concerns himself, as he makes plain in his subtitle, "The Judicial Function in the Maintenance of the Federal System and the Preservation of Individual Rights." A federal constitution inevitably necessitates the existence of a court entrusted with its interpretation. The Argentine Supreme Court, it appears, has had to deal with many questions which to a United States lawyer must strike a familiar note, and United States precedents are constantly quoted and generally followed in the Argentine.

The student of comparative legislation will be especially interested in the features of the Argentine constitution which differentiate it from other federal systems, and particularly from that of the United States. One of the most important of these is the Article which authorizes Congress to enact civil, commercial, penal and mining codes providing the substantive law applicable in both federal and provincial courts, with the result that "from the point of view of uniformity of legislation the Argentine system goes far beyond that of the United States." Presumably the great controversy which recently ended in the reversal by the United States Supreme Court of the principle of *Swift* v. *Tyson* in the *Erie Railroad* case could not have occurred in the Argentine. Other interesting variations from the United States model are to be found in the method of constitutional revision and amendment and in the federal power of intervention in State affairs in certain contingencies.

For those who wish to pursue the profitable and opportune study of the manner in which a modern nation in the New World has worked out the legal side of its constitutional problems, Dr. Amadeo has provided an admirable and indeed indispensable guide. His volume finds a worthy place in the series of Legal Studies appearing under the auspices of the Faculty of Law of Columbia University.

M.

CANADIAN COPYRIGHT.

In his preface to a learned treatise[2] on the Canadian Law of Copyright, Mr. Fox points out that the English Copyright Act of 1911 is, in a number of respects, quite different from the statutes that govern the Law of Copyright in Canada, and that the course of the Law, in those fields, has accordingly embarked upon divergent courses. In another passage the author says that "it has long been my feeling that Canada has great need of a distinctive legal literature of its own, and the desire to take some share in its construction has urged me to undertake the present work."

The possibility that the law of Canada (and of other Dominions also) and the law of England may, in the field of copyright and in other fields of law and legislation, embark upon divergent courses, and may need a distinctive legal literature of their own, raises an issue of some constitutional importance. A generation ago, students of English constitutional law used to be taught that the links of Empire and Imperial unity were threefold: the legislative link of the Imperial Parliament, the executive link of the Imperial Crown, and the judicial link of the Privy Council. Without entering into detail, one may say that the constitutional tendency of our time has been to weaken, if not to abrogate, these several links. The Imperial Parliament no longer retains its old legislative supremacy; the Imperial Crown is no longer One but Many; the Privy Council is no longer a link with Eire or with South Africa.

In these circumstances the ancient link of the Common Law and the modern link of Statute Law (where the Statutes are uniform) come to possess a real constitutional value and significance. It is of no small importance to the future of international relations that the great Dominions of Canada and Australia and New Zealand and Eire (if Eire remains a Dominion) are united in a common tradition of law and legal principle, and that all the States (save one) of the American Union belong to the same tradition, and

[2] *The Canadian Law of Copyright.* By Harold G. Fox, M.A., LL.B., B.C.L., Ph.D. (The University of Toronto Press, 1944.) $18.50.

that students of law from China habitually borrow their principles from the tradition of Anglo-American jurisprudence.

One may hope that if the laws of the Dominions embark on divergent courses, and come to need a distinctive legal literature, they will keep course within the wide limits of the common tradition that they share.

The law of copyright in Canada is principally contained in the Copyright Act of 1921, as consolidated and amended by Statutes of 1927, 1931, 1935 and 1936, the whole being consolidated by an office consolidation of 1938. Notwithstanding certain dicta in *Gribble* v. *Manitoba Free Press* (1932 1 D.L.R. 169), the better opinion would seem to be that neither the Berne Convention, which was scheduled to the Act of 1921, nor the Rome Convention, which was scheduled to the Act of 1931, forms any part of the Municipal Law of Canada. (*De Marianwert* v. *Administrator of Austrian Property* (1924 2 Chancery 282); *Walker* v. *Baird* (1892 A.C. 491)). The Canadian Copyright Statutes being later than the relevant English statute, contain certain provisions which are not to be found in the Copyright Act, 1911. Thus the Canadian Act of 1931. by s. 2 (3), gives a new definition of "performance" which introduces the words "by radio communication," which do not appear in the English Statute. Again, s. 12 (5) of the Canadian Statute has an interesting provision that "independently of the author's Copyright, and even after the assignment, either wholly or partially, of the said Copyright, the author shall have the right to claim authorship of the work, as well as the right to distrain any distortion, mutilation or other modification of the said work, which would be prejudicial to his honour or reputation." The enumeration (in s. 17) of the acts which shall not constitute an infringement of copyright, includes certain provisions which are not to be found in the English statute, and s. 18 of the consolidated Statute provides that "it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper." There are other differences in relation to making in Canada of manuscript arrangements and instrumentations, in relation to the manufacture of records and perforated rolls, and other contrivances. By ss. 25 and 26 of the consolidated Statute, summary remedies are provided in the case of persons performing copyright works in public or of persons changing or suppressing the title or the name of the author of any dramatic or operatic work or musical composition in which copyright consists.

The case law appears to be fully discussed with reference to Canadian cases. One finds, for instance, that the case of *Ernest Turner* v. *Performing Rights Society* (1943 1 Ch. 167) is included and a long extract from the Judgment given. In the chapter on Authors and Publishers one misses a reference (in the section on Price Maintenance Agreements) to the well-known case of *North-Western Salt Company* v. *Electrolytic Alkali Company* (1914 A.C. 461). In the chapter on Libel and Slander the author appears to have used the 2nd (1928) edition of Gatley on Libel and Slander instead of the 3rd edition which was published in 1938, and he fails to notice certain of the more recent cases, especially Dominion cases, which deal with important matters under this title. It is fair, however, to add that while the author claims to refer to all Canadian and English cases, he seeks only to give "a moderate selection from the Courts of other parts of the Empire and the United States." The claim in respect of Canadian and English cases appears to be made out, though at times one is conscious, as e.g. in the reference at page 570 to *Marbe* v. *George Edwardes* (1928 1 K.B. 269) that the effect of the decisions is stated in a rather summary way. One readily admits that these are minor faults in a work of over 700 pages. Altogether, the book must be said to be alike in statement and in production an admirable work, which will be eminently useful to practitioners and to students, and which mirrors in its pages the industry and the learning of a distinguished mind.

R. O'S.

THE DEVELOPMENT OF INTERNATIONAL LAW IN ITALY.

More than half a century ago Maine called attention to the "imperfect communion of thought" existing between English lawyers and the jurists of the Continent of Europe and to the difficulties thus created in the international sphere. There has, no doubt, been some improvement in the situation since Maine wrote, owing to the increased attention now being paid to the study of foreign law, but much remains to be done before it can be said that "England can appear on the theatre of international affairs by delegates equipped with the species of knowledge which furnishes the means of intellectual communication to the other performers on the scene." English lawyers should, therefore, welcome the appearance of Professor Sereni's monograph[3] on *The Italian Conception of International Law*, both because of its undoubted merits and because the materials on which the learned author has drawn are for the greater part inaccessible to the majority of English readers. Italian jurists have made a notable contribution to the growth both of public and of private international law, and it is difficult to appreciate certain trends in Continental legal thought unless due regard is paid to Italian influences.

[3] *The Italian Conception of International Law.* By Angelo Piero Sereni. 1943. (New York: Columbia University Press.) 36*s.* 6*d.*

Professor Sereni deals with his subject matter chronologically and traces the development of international law in Italy from the age of the post-glossators down to the present day. His purpose is twofold—historical as well as political—and his treatise is not only intended to serve as a guide to future writers on the general history of the law of nations, but also to show that a deeply-rooted love for justice and freedom pervades the writings of all the earlier Italian jurists, and that their successors of the twentieth century have striven to maintain a silent but effective resistance against the influence of Fascism.

The first part of the book is concerned with the birth of the concept of a law of nations in Italy during the period of the Renaissance, and is mainly of historical interest. No one is likely to challenge the author's view that it was the work of the Italians who revived the study of Roman law which made it possible to formulate rules of international law for the first time, but his conclusion that the rise of an international community can be traced to a date before that of the Peace of Westphalia is, perhaps, more controversial. He points out that the Italian city states of the Renaissance were the first to cast off the shackles of feudalism and to claim *de facto*, if not *de jure*, freedom from subjection to the Papacy and the Holy Roman Empire. This was because they were, for the most part, seafaring and trading communities and, therefore, impatient of any control which might hamper their economic activities. There was, inevitably, a struggle for the maintenance of the balance of power between them, and this implied that they were on a footing of equality, which at a later date furnished the basis for the assertion by Alberico Gentili of the theory of the universal character of the international commonwealth. Professor Sereni attributes the general acceptance of the Peace of Westphalia as the date at which the old society of Christendom under the Pope and the Emperor became transformed into a real international community, to the neglect of the part played by Gentili and his Italian contemporaries, whose writings had fallen into oblivion and passed unnoticed until recently. He concedes that there was nothing which could be termed an Italian school of international law at the time of the Renaissance, but claims that the conception of an international society was first expounded by individual Italian scholars of this period.

The decadence of Italy which followed on the Renaissance gave a negligible value to the influence of Italians on the theory and practice of international law during the seventeenth and eighteenth centuries. The era of the Risorgimento was, on the other hand, marked by an important development which was entirely due to the activities of Italian jurists, namely, the formulation of the so-called doctrine of nationalities. This in its inception was a political theory designed to serve as a counterpoise to the legitimist principles of the Holy Alliance which bound the greater part of Italy in subjection to the foreigner. It was conceived as a universal doctrine applicable to the whole world —not merely to Italy alone—but was destined to become the symbol of Italian independence and to provide the necessary ideological basis for the movement for Italian unity. Almost every Italian writer on international law at this time accepted the doctrine with enthusiasm and without qualification, so that a somewhat uncritical atmosphere was created in which an exaggerated importance was attributed to the doctrine.

Its leading exponent was Mancini, who was appointed in 1851 to the Chair of International Law at Turin, and subsequently became one of the most active members of the Institute of International Law. His view was that international relations must be based, not on states, but on nations, i.e., on populations possessing a " consciousness of nationality " (*conscienza della nazionalità*). Nations, in this sense, are perforce equal, and the ideal to be pursued is that of their union in an organization on a juridical basis which would serve to limit, if not to abolish, the possibility of injustice in international transactions. The doctrine is open to obvious objections. It is artificial because it cannot be reconciled with the geographical distribution of racial communities. It is also inconclusive because its supporters have never been able to agree on the factors which must be present to constitute nationality. But its influence was widespread, and it has had consequences of a far-reaching nature. It set up what Professor Sereni terms a new form of " juridical idolatry "—an idolatry of nationality which had all the faults of the theocratic conception of human society, and was destined to serve as an instrument of oppression. In particular it has proved to be a fertile source of international friction by creating an exasperated sentiment of nationality without providing any solution for the vexed problem of the rights of minorities. Mancini's followers, notably Fusinato, were quick to appreciate the danger, and this led to a restatement of the doctrine which, in effect, was equivalent to its abandonment, and it has never secured a place amongst the accepted principles of public international law. On the other hand, it has taken root in private international law. Most of the European systems of law have accepted it as the test of the personal law of the individual, and this has resulted in the formulation of the doctrine of renvoi rendered necessary by the consequent clash between the domiciliary and national conceptions of personal law. Here again one meets with a political background, because the contest is, in practice, one between the so-called states of emigration, who are interested in retaining the allegiance of their citizens who go

overseas, and the states of immigration, who are anxious to absorb the foreigner who settles in their midst. The influence of the doctrine on the growth of public international law in Italy was, however, of a transient nature, although it had the unfortunate result of monopolizing the attention of Italian jurists during the latter half of the nineteenth century and of isolating them from the broad current of European legal thought.

At the beginning of this century a reaction set in against theories of the natural law origins of international law, and this found expression in the teaching of the Italian positivist school which is associated with the names of Anzilotti and Donati. Professor Sereni, quite rightly, regards this as the most important contribution made by Italian scholars to the development of the theory and practice of international law, and the volume under review contains a careful and detailed analysis of the views of Anzilotti and his followers. In its original form Italian positivism rejected all sources of international law other than the consent of the nations as embodied in the maxim of *pacta sunt Servanda*. It soon became clear, however, that this position could not be maintained, and the theory was restated in a modified form by Anzilotti's followers with the assent of Anzilotti himself. The present-day Italian positivists, of whom Professor Sereni is one, although they reject all natural law concepts as the basis of international law, do not regard it as being exclusively founded on consent. They adopt a position which is tantamount to the abandonment of the doctrines originally propounded by Anzilotti, though they continue to insist on the legal as opposed to the moral, political and philosophical aspects of international law. A tribute must be paid to the undoubted services which they have rendered towards the establishment of public international law on a juridical basis. Those who are familiar with their writings can testify to the precision of thought and the lucidity of argument which are characteristic of their contributions to the science of international law.

To a contemporary English reader the most interesting portion of Professor Sereni's monograph consists in the chapters which he devotes to a present-day situation of international law in Italy, a matter about which we in this country are ill-informed. The author maintains that the Fascist régime has left no lasting mark on the development of international law. He points out that Fascism was, in its inception, a pragmatical and empirical movement which had for its main purpose the control of Italian political and economic life. The Duce himself observed "*Il nostro programma è durare,*" and stated that Fascism was not for export. But at a later stage when the régime was firmly in the saddle a different point of view began to prevail. Distinctions are made between the "old and effete" and the "young and vigorous" nations, and between the "haves" and the "have nots." Under German influence it is postulated that there are two "philosophies of life," i.e., the Fascist and the Democratic, and the inference is drawn that they cannot co-exist. Hence the conception common both to Fascists and Nazis of a world-wide revolution which was to end in the establishment of regions or spheres each under the control of one of the "*Herrenvolk.*" It is no longer said that Fascism is not for export: on the contrary, the régime seeks to establish its agencies in all countries of the world. The outcome of this was the foundation of the bodies known as "*Fasci Italiani al Estero,*" which operated under the close supervision of Italian consulates and embassies, and also the extension of the activities of O.V.R.A., the Fascist counterpart of the Gestapo, to foreign countries. All these activities were co-ordinated and controlled by a shadow department of the Italian Foreign Office, the *Instituto per le Relazioni Internazionali*. Moreover, the grip which Fascism secured on Italian economic life was followed by the creation of State purchasing agencies and the like which could operate abroad, masquerading as private agencies, and could be disowned by the Fascists whenever it suited them to do so. Professor Sereni states emphatically that Fascism made no attempt to formulate new rules of international law. It was content to make use of existing rules for its own purposes. The distinction between State and private enterprise was skilfully employed for the purpose of avoiding international responsibility, and breaches of the laws of war were committed under a mask of pseudo-legality.. But there does not appear to have been the same rigid degree of control and censorship over academic life and thought as in Nazi Germany. It is notorious that Mussolini and his followers were not interested in legal principles save in so far as they found that they could turn them to their own advantage and, during the greater part of the Fascist era, there was little interference with the activities of the law schools. In a sense, Fascism and the Italian positivists had this much in common, that both rejected the concept of rights and duties founded on natural justice, and this may have served to protect the Italian school of international law from political pressure. It is, perhaps, too early to form any conclusive opinion on this question, but it seems to be an undoubted fact that, until the final stages of the Fascist régime, when German influences were omnipotent, writers such as Anzilotti, Cavaglieri and Balladore Pallieri were left free to develop their theories without any necessity for the payment even of lip service to the doctrines of Fascism.

In conclusion, the volume under review has every claim to be regarded as an important and valuable addition to books in the English language on topics of international law.

Professor Sereni deals throughout in scholarly fashion with his subject matter, and his presentation of controversial questions is marked by impartiality and moderation. It has been a pleasure to read this book, not only because of its intrinsic merits, but because it is written in excellent English and is free from the difficulties of style and terminology which sometimes put a great strain on the readers of books written in our language by foreign authors. Professor Sereni only advances the very modest claim that he has done some of the spade work which is necessary before a general history of international law can be written. But he has done more than this. He has made it possible for Anglo-American lawyers to obtain an insight into certain important modern developments in international law, and there is no field of law in which it is of greater importance that the various schools of thought in different parts of the world should be in touch with one another.

H. C. GUTTERIDGE.

THE LAW OF WAR AND PEACE IN ISLAM.[4]

DR. KHADDURI points out that Muslim "International Law" is very different, especially in its origin and doctrinal basis, from the International Law of modern Europe and America. The International Law with which we are familiar is a body of rules accepted as binding corporate states in their relations with each other. It is "of international obligation." Muslim International Law is a body of rules based upon the divine law of the Koran determining the manner in which Muslims should treat non-Muslims within and without Muslim communities. It is of divine and not of international obligation; it is primarily binding on individuals, not on states; and it is transient, existing only until the final acceptance of Islam by the whole of humanity.

Yet Muslim International Law covers in part at least the same matters as does our International Law—ambassadors, treaties, treatment of "aliens," arbitration and the like, and this gives some opportunity for comparison.

Dr. Khadduri deals only with the genuine and original doctrines of Muslim International Law. New conditions in which Muslim states, organized on modern lines, enter into relations with so-called Christian states, call, indeed, for new interpretations of Muslim doctrines. When European law is introduced into a Muslim State the same process is necessary; the new legal conception must be found to be not incompatible with Muslim doctrine, though divergent from the institutions which have developed in the older Muslim world. With this state of things Dr. Khadduri does not deal. His valuable little monograph is concerned to trace in an objective spirit the doctrine and practice of Islam when untouched by modern influences. He speaks of the Jihad, of belligerents and belligerent property, of securities for non-Muslims, of treaties, arbitration and diplomacy.

As he points out, this Jihad created a real, though often dormant, state of hostility between the *Dar el Islam* and the *Dar el Harb*. It was based not primarily on commercial or territorial greed, but on an ideology. War was divinely enjoined to secure the world acceptance of Islam, but only followed upon a refusal to accept a peaceable invitation. War by divine injunction for the saving of the nation is not unknown outside Islam, but Islam furnishes the most admirable example.

A comparison of the ideology of Islam with that of Judaism is interesting; the two religions have many common features. It is certainly possible to describe the original Hebrew conquest of Palestine as a Jihad, though the Hebrew books which are our authorities have no doubt been subjected to later priestly rescensions which may well obscure the actual facts of those distant events. Judging by the documents as they stand, the conquest is represented as a religious war undertaken by a body of fanatical monotheists with a view to the extermination rather than to the conversion of a nation of idolators. But there are traces of a prophetic dream of final conversion when the war shall cease because its purpose has been accomplished. A passage in Zechariah, Chap. VIII, verses 20-23, may be quoted in illustration. Commenting on this passage, the learned if laborious Pedersen writes:—"At the present time the Israelites are oppressed, ruled by others, but one day they will get full power and *shalom*. All thought of fighting against them drops quite naturally, other peoples only think of pacifying the mighty God of Israel, and with humble prayers they tug at the mantles of the Israelites, in order to be permitted to go with them and have a share in their peace." (*Israel*, by J. O. H. S. Pedersen, at p. 323.)

F. M. G.

AN OUTLINE OF NATIVE LAW.

NATIVE law has received more attention in South Africa than elsewhere in the British Empire or Commonwealth, and the work of Mr. Julius Lewin on this subject is well known to readers of the *Journal*. He has recently written a brief outline of native law[5] which should be of great value to the judiciary as well as to the natives of South Africa, since

[4] *The Law of War and Peace in Islam.* A study in Muslim International Law. By Majid Khadduri, Ph.D. 1941. (London: Luzac & Co.) Pp. 132.

[5] *An Outline of Native Law.* By Julius Lewin, Advocate of the Supreme Court of South Africa, of the Middle Temple, Barrister-at-Law, Lecturer in Native Law and Administration in the University of the Witwatersrand, Johannesburg. (Johannesburg: R. L. Esson & Co., Ltd., 1944.) Pp. 30. 1*s*.

there is here presented a concise summary of all the main rules of civil law applicable to natives as natives.

In South Africa special courts have been established to hear civil cases between natives. There are Chiefs' Courts, Native Commissioners' Courts, and Native Appeal Courts. In the Native Commissioners' Courts the Commissioner has a discretion whether he will apply native law or the common law of South Africa. The latter is applied in cases which do not arise out of native custom. But it is not always clear which law should be applied, and some courts endeavour to bring natives as far as possible under the Common Law, while others favour the reverse process. Mr. Lewin would resolve the conflict by amending the Native Administration Act of 1927 so that native law would only be applicable to natives living under tribal conditions. It may be objected, however, that it may not always be easy to draw the line between tribal and non-tribal conditions, and even under non-tribal conditions native law may still, in many circumstances, be the more appropriate, and indeed the only possible, law applicable.

Mr. Lewin makes no attempt to cover the whole field of native law, which, incidentally, he defines as " those old Bantu customs—together with certain changes made in their administration by Parliament—which courts may enforce in civil cases between natives." There are chapters on marriage, divorce and property rights under the common law; customary unions and divorce therefrom; inheritance under the common law; inheritance under native law; lobolo; guardians and children under the common law; and the conflict of native law and the common law.

Mr. Lewin concludes by observing that " we need more books to inform European lawyers and courts in detail about the exact way in which some tribal customs work. The Government should encourage and assist the writing of such books." If this is true of the Union it applies with still greater force to other parts of Africa, where practically nothing at all has been done in this direction (apart from the work of I. Schapera in Bechuanaland).

Mr. Lewin's *Outline* is a stimulating booklet, and goes far to clarify the legal position of natives in South Africa.

C. K. Meek.

THE CRISIS OF THE NATIONAL STATE.[6]

This is an able and interesting book, clearly written, well arranged and documented and indexed, and giving evidence of wide reading and thought upon his subject and close observation of current events by the author. It aims at giving a dispassionate analysis of the factors constituting the evolution of the national state and the forces which in recent times, from different directions and with different objects, have tended to undermine its position as the repository of dominating power in world affairs. It discusses the coming need for vital decisions as to the manner in which international relations shall be reorganized after the present war and the choice to be made between possible alternative plans for supplementing the national state or creating new political groups within the world community. By the careful examination which the book provides of the rise and past development of the national state and the forces now threatening its position and tending to its decline, the author hopes, not without justification, to clarify the problems involved and light the way for the coming decisions.

Among the various changes in world conditions, political and economic, referred to as constituting the " crisis " of the national state, the most recent and the most serious is the development of the German idea and policy of " grossraumordnung," which is described as being a formula for " unlimited and ever-expanding claims to domination and a pseudo-legitimation for the destruction of other national states," and as having parallels in " Italian claims to Mediterranean dominion " and " the growing Japanese Empire of the Far East."

Besides " grossraumordnung " the author discusses five other ideologies which he distinguishes as standing out specially among the multitude of internationalist ideas and movements expressing " the aspirations of an anarchic world that is groping for a new order," namely, the fascist international, the ideal of collective security, the multi-national state, the federal ideal, and the " rights of man " ideology.

Incidentally, the book throws valuable light on the working and effects of nationalism, imperialism (old and new), patriotism, national sovereignty, bureaucracy, international communism, capitalist exploitation, and international independence and interdependence.

F. N. Keen.

SOCIAL SECURITY.[7]

The subject of social security is receiving attention throughout the world. The International Labour Office, realizing that fact, has provided the material for its study—so far as there has been embodiment in the constitutional provisions of the different countries. The result has been a collection of statements concerning social and economic policy covering

[6] *The Crisis of the National State.* By W. Friedmann. (Macmillan & Co., Ltd.) Pp. ix, 197. 12*s.* 6*d.*

[7] *Constitutional Provisions Concerning Social and Economic Policy.* Framed by the International Labour Organization. (Montreal: International Labour Office). Pp. lix, 755.

450 countries and other governmental units. Naturally there has been some difficulty in determining the range of questions to be dealt with in such a comprehensive survey. The selection has been made upon the basis of the principles formulated in Article 41 of the Constitution of the International Labour Organization. In order to make the volume serviceable to those who are called upon to frame future instruments it has been necessary to include in it not only provisions relating to " the comparatively narrow domain of conditions of work " but equally provisions relating to " the infinitely more extensive area of conditions of life." In an informing explanatory note it is observed that subjects such as education, public health, public utilities, the regulation of industry and commerce, and the ownership and control of natural resources, must clearly have as important a place in any international or constitutional charter of social and economic principles as the general principles of labour legislation and the provision of social security through social insurance and social assistance. On the other hand, care has been taken to exclude subjects such as finance and religion which may be regarded as definitely beyond the scope of the selection.

The inclusion of a selection from the provisions representing in most cases an earlier stage of constitutional and economic evolution which affirm individual rights will be particularly welcome to those who share the concern expressed by Mr. Richard O'Sullivan in the *Modern Law Review* (volume VI, p. 177) as to the effect that some of the Social Security proposals may have in this country upon individual freedom. Provisions concerning freedom of association, freedom of speech and expression, freedom of the press and the right of petition have accordingly been included, while provisions concerning freedom from arbitrary arrest and freedom from arbitrary legal process, on the other hand, have been excluded. A similar line of thought has been followed upon the question whether constitutional provisions affirming principles of international policy should be included in the volume.

There is a cautionary observation reminiscent of the well-known concern so often expressed by M. Thomas that the collection of constitutional declarations of principles such as is contained in the present volume cannot give any picture of the manner in which, and subject to which, such declarations of principles are implemented in practice. A study of how such constitutional principles can best be made effective under the varying conditions of different countries, even if it excluded the economic problems involved as such, would require the preparation of a comparative survey of institutions, administrative methods, and systems and standards of law enforcement. Such a survey necessarily falls outside the scope of a volume which is primarily a collection of constitutional texts. Similarly the action which may be taken in foreign countries to arouse questions about the constitutionality of any particular piece of legislation have been regarded as outside the scope of the book.

The book has been prepared with that care and fullness characteristic of publications of the International Labour Office. Not the least valuable feature is a comprehensive bibliography extending to 22 pages.

POLITICAL REFUGEES IN ANCIENT GREECE.[8]

Professor Balogh has written a most interesting and timely book with the assistance of a scholar who has a wide knowledge of Greek political and economic conditions. The main text is clearly written and, in general, shrewd. Here and there the author generalizes rather too firmly, e.g., " This explains the practice of all revolutionaries to maintain the outward appearance of existing institutions, while in reality changing them radically and placing them in the service of a new order " (p. 3). This sentence would surprise many eminent revolutionaries of the present and the past. Equally it is an oversimplification to say that in the fourth century Greek " trade and industry fell into stagnation " (p. 32). But it is easier to observe such sentences than to avoid them altogether.

The first chapter, " From tribal usage to city law," is only introductory, and any doubts which it may arouse do not affect the main theme of the book. It should be said that not all will agree with the picture of the oldest Greek attitude to the refugee, and that some will miss something about the phratry and about the influence of religion, especially the influence of Delphi. The first section of the second chapter, " Proscription and banishment in the Polis," has to deal with highly controverted evidence, and probably no two scholars who have studied this evidence carefully would agree in all details. The present reviewer would not accept more than a part of Professor Balogh's conclusions, but this is not the place to discuss these difficulties. The same, to a lesser degree, is true of the second section. The third section is on surer ground. The handling of the famous decree on Arthmius of Zeleia is excellent, but it is to be remembered that it was followed by the " Peace of Callias," which alone makes highly doubtful the treatment of the Peloponnesian embassy in 430 B.C. (pp. 21-2). The translation of ll.4-10 of the Chalcis Decree appears to be inconsistent both with n. 68 and with the paragraph that follows. The fourth section is admirable, and it should be said that from

[8] *Political Refugees in Ancient Greece from the Period of the Tyrants to Alexander the Great.* By Elemer Balogh, with the collaboration of F. M. Heichelheim, Johannesburg, Witwatersrand. (University Press.) 1943. Pp. xvi, 134.

now on the book becomes better and better as the evidence becomes more abundant and less open to legitimate doubt.

The third and fourth chapters, "The political refugees in exile" and "The repatriation of political refugees" cover much ground extremely well. Difficulties are not evaded, and the author does not forget the wise dictum of John Selden, to whom the book is dedicated: "Aye or no never answered any question." It may be doubted if the institution of the *proxenia* was so beneficent in this matter as is suggested. In the first part of chapter three one misses a discussion of the statement in Plutarch's *Solon* 24 that Solon at least did not hinder the enfranchisement of those who were in perpetual exile from their cities and those who moved with their families to Athens to follow a skilled handicraft. It may be suggested that the amnesty law of Solon had partly in mind the repatriation of *hektemoroi* who have left Athens to avoid becoming *agogimoi*, thus injuring their creditors, if *atimia* in the earlier sense was the penalty for this. But these are details, and these two chapters will have lasting value, combining as they do the literary and epigraphic evidence against a background of sound comment and interpretation.

The main text ends with a short epilogue, in which the author turns to the modern problem which weighs upon the mind and conscience of the civilized world. He has already given just praise to ancient efforts to repatriate refugees in a practical and generous way, and he reaches the conclusion, with which it is hard not to agree, that "the majority of refugees are and must be ruined without an agreed repatriation on fair terms in spite of all the good will of those who assist them."

The proof-reading of the main text has been careful and there are very few formal slips. On p. 12 *Hippobotai* should replace *Hippobates*. There are more misprints and some mis-spellings of English words in the notes, but these are not days when it is easy for a manuscript partly prepared in Great Britain to be well proof-read for publication in South Africa. The accuracy of the references in the notes, in view of their range, is exemplary. More than that, the notes display a wide knowledge of modern literature on all topics touched upon. The citation of certain epigraphic texts in their best available form is welcome, and the selection of those so treated is well judged. There is some lapse into a practice becoming too common in Continental scholarship, that of citing the most recent articles and books on a topic without considering exactly enough how valuable they are. For unfortunately scholarship is not so sure-footed that each new contribution marks an advance. Nor is the most recent article always relevant to the precise point to be illustrated. To take one instance in n. 24. Professor Rose's interesting discussion of Herodotus's story of Phye in *Class. Quarterly*, 1940, is not really relevant, and Mr. Glover's paper in the *Proc. of the Cambridge Philological Society*, 1940 (1941) does no more than revive a neat emendation made by Unger in 1883, which was, in the view of the present reviewer, refuted three years later by Toeppfer. Mr. Gomme's paper in the *Class. Review* for 1936 is hardly relevant in n. 67, and would appear more suitably in n. 68. It seems very hazardous to say that "the murder of an Athenian in the towns of the first Athenian Empire was, as a rule, punished by a fine of five talents" (n. 83) on the evidence of the much restored I.G.1^2.28. But even if some slight pruning would have improved rather than harmed the documentation, it remains a notable collection of material that will add to the general value of the book.

F. E. A.

THE GOVERNMENT OF FRENCH NORTH AFRICA.[9]

THIS is the first of a series of "African Handbooks" produced by the African section of the University Museum of Pennsylvania, in collaboration with the University Committee on African Studies. The series will cover a wide range of subjects. The six succeeding Handbooks, for example, are entitled *The Mineral Resources of Africa, African Food Resources, Colonial Policies in Africa, African Labour Problems, The Government of British West Africa*, and *The Government of French West Africa*.

The present volume deals with the administrative and legal systems of Morocco, Tunisia and Algeria. These systems differ widely. Algeria was annexed by France in 1834 and the native systems of government were not retained. Most of the legislation for Algeria is enacted in the Mother country, supplementary legislation only being enacted in Algeria itself. Algeria therefore occupies a position somewhat midway between that of a colony and an integral part of the Mother country. Morocco and Tunisia, on the other hand, were occupied but not annexed, and a large measure of native government was retained.

In Morocco all legislation emanates from the Sultan, who is both a temporal ruler and head of the Moslem community. He is, therefore, the guardian of the religious law, which he is bound to observe and may not alter. His legislative powers are also restricted by the provisions of the Protectorate Treaty of 1912. The judicial system falls into three groups: (*a*) the French Courts, (*b*) the native Secular Courts, and (*c*) the native Religious

[9] *The Government of French North Africa.* By Herbert J. Liebesny. (The University Museum: University of Pennsylvania Press.) 1943. Pp. 130. 9*s.* 6*d.*

Courts. The officials of the native secular courts are administrative officers who are not expected to have any detailed knowledge of the law. Their judgments are based on equity. The procedure is oral and speedy, but the lack of legal knowledge induces the caid or pasha who tries the case to decide it at will—a system which hardly makes for consistency. The French Commissioner takes a part in the sessions of the native secular courts, but he may not lead the debate or interfere with the judgment, though he can institute an appeal to the Sherifian High Tribunal. In the Berber regions there are tribunals which administer native customary law. The Berber practice formerly was that the jema'a, or local council, attempted to reconcile parties to a suit, and if the attempt failed the case was referred to one or more arbitrators, from whose decision there was an appeal to a second or even a third. The judgment of the third was final. It is not clear if this procedure is still followed. The French introduced a right of appeal in criminal matters to French Courts, but this was considered inconsistent with the general administrative policy, and in 1934 a criminal section for Customary Law cases was created in the High Sherifan Tribunal. The French and native organizations are in fact entirely different branches throughout. There is no overlapping in that, e.g., an appeal would lie from a native court to a French court. This creates difficulties where jurisdiction is claimed or disclaimed by both French and native courts, but the accepted rule now is that the native courts must yield to the decision of the French courts.

In Tunisia the Native Administration functions generally as in Morocco, with caids who exercise administrative, financial, and judicial powers. But in Tunisia there has been a tendency to separate administrative from judicial functions, and the Bey himself has resigned his judicial prerogatives, retaining only his right of grace. Suits concerning the personal status or inheritance of native Moslems or Jews come before the Mohammedan or Rabbinical tribunals. Real estate is also governed by Islamic law, but, as in Morocco, "immatriculated" real estate, i.e., parcels of property which have been subjected by a process of registration to French law, are exempt from the jurisdiction of the religious courts.

In Tunisia there is a code of obligations and contracts which, while predominantly French, contains a number of contracts which are exclusively Moslem. In other matters it endeavours to combine French and Moslem rules, particularly with regard to the proof. There are also codes of civil and penal procedure which are only applicable in the native secular courts. Prosecution has been introduced on the French model and there is deviation also from the Moslem system of proof, which requires the judge to observe certain strict rules in the evaluation of evidence. In general in Tunisia the French courts apply French law, the native secular courts apply the Tunisian codes which constitute a mixture of French and Islamic law, while questions relating to the personal status of Moslems and Jews and to non-immatriculated real estate are under the exclusive rule of the native law.

In Algeria the Northern territory is administered along lines similar to metropolitan France, while the Southern region is under military control. French citizens are exclusively under French law, apart from modifications introduced by special statutes. This applies also to persons legally assimilated to the French. To native non-citizens the law applied is partly French and partly native. There is, however, a distinction between the Northern civil zone and the Southern military zone. In the former non-citizen Moslems remain under the rule of their native law in respect of personal status, inheritance and those parcels of real estate which have not come under the French law, though the judge should take into account the customs of the parties when judging personal suits. The parties may renounce the application of their own law and custom, even in cases concerning their personal status, inheritance or real estate. Outside the civil territories of the North the natives are under the rule of their own native law with regard to all civil and commercial matters, but in criminal matters French law is applicable. It is to be noted that in Algeria, in contrast to the Protectorates of Morocco and Tunisia, the native courts of the cadis are integrated into the French judicial system, in so far as appeal lies from these courts to the French tribunals. It is also noteworthy that all cases not cognizable by the cadis have to be brought before the French justices of the peace, who frequently have to apply Moslem law, particularly in cases where real estate, which has not been made subject to French law, is concerned. In these cases the justices do not follow the ordinary French procedural rules, but simplified regulations which were laid down by a decree of 1889.

It is obvious that, with the existence of various legal systems in the same territory, there must be frequent conflicts of law. These may be solved by the general principles of private international law. Or special prescriptions may have been laid down by decree. In Algeria, for example, a decree of 1874 provides that if a conflict of laws arises between Arab and Kabyles the law to be applied in real estate cases is that of the place where the parcel of land is situated; in cases concerning personal property or other personal matters the law to be applied is that of the place where the contract was concluded; where no contract was concluded the legal situation is determined by the place where the event occurred from which the obligation originated. The parties may, however, indicate

to what law they want to submit their cases. Moslem law has its own rules governing conflicts. Among these it is provided that where the parties belong to different rites the defendant has the choice of the rite to be applied. The rules governing conflict between Islamic and foreign law in North Africa are of little practical importance, since a non-Moslem hardly ever comes before a Moslem court, and French courts normally apply French rules.

The handbook, in spite of a tendency towards repetition, provides in a concentrated form a very valuable account of the systems of government and law in French North Africa, and sets an example of what might well be done in England for each of the British Colonial dependencies. It should prove a useful reference book for students of comparative legislation.

C. K. Meek.

THE CONFERENCE OF AMBASSADORS.[10]

A dissertation, begun as a mere academic study, assumed in the course of its preparation an increasingly political tone until it became, what it is now, a severe indictment of the conduct of international affairs by the Allied Powers after the Peace Settlement of 1919.

By the treaties of that year various details of the settlement were left to be determined and supervised by the Governments of the Allied and Associated Powers, which, after America had withdrawn, meant in practice France, Great Britain, Italy and Japan. These Powers, making Paris their seat of authority, acted through their ambassadors resident thereat, with the exception of France, whose President occupied the ambassadorial chair.

This body, nominally subordinate to the Council of the League of Nations, kept for a time within the limits vaguely assigned to it by the Council. Thus it drew up new constitutions for Danzig and Memel; it defined the boundaries of Teschen, Poland and Albania; it supervised no fewer than five plebiscites required to determine the nationality of various disputed frontier regions of the Continent; it superintended the activities of the military control commissions appointed to ensure the disarmament of the defeated Powers; similarly it took cognizance of the operations of several other commissions, for example, those that temporarily administered the Rhineland; finally, it dealt with "special questions of various kinds," of which a bewildering miscellaneous list is given by Dr. Pink on pages 193-198 of this thesis.

Wide as these activities were, it is impossible to say that any of them lay outside the proper sphere of the authority of the Conference of Ambassadors. For its powers were defined so vaguely and were interpreted so variously that, whatever protests might be made concerning its decisions, it was impossible to prove that in any case it acted unconstitutionally. Thus, gaining knowledge by experience, and acquiring boldness by immunity, this little band of diplomats, acting in the name of their respective Governments, began to encroach upon the province of the Council of the League of Nations, and to give decisions on matters not of detail merely but of fundamental principle.

Dr. Pink devotes the whole of the second part of his dissertation to a careful examination of five cases in which he considers that the Conference of Ambassadors definitely exceeded its proper functions. These were, first, " The Kirchschlag Affair "—the seizure by Hungary of a slice of Austrian territory in 1921; secondly, " The Declaration in regard to Albania," also in 1921, when Albania was virtually placed under the protection of Italy; thirdly, " The Janina-Corfu Affair " of 1923 when the grave problems raised by the assassinations of Italians at Janina and the seizure of Corfu from the Greeks were summarily and unsatisfactorily dealt with; fourthly, the constitutional crisis in Hungary caused by the attempt of the ex-king Charles to recover his lost throne; and, finally, the effort of the Hohenzollern ex-Crown Prince to return to Germany from exile.

Dr. Pink concludes by examining the factors which enabled this Conference of Ambassadors thus to encroach upon the functions of the Council of the League. He considers that they were first its smallness—it was limited to the representatives of the Great Powers; secondly, its permanence—it was always in session; thirdly, the secrecy of its methods and their informality—its procedure was diplomatic; and fourthly, the dominance which the President of the French Republic—especially M. Poincaré—secured in the Conference.

He shows good grounds for holding that the Conference, like its famous predecessor of 1815, degenerated into an instrument of tyranny and became " a political hindrance to the peaceful reconstruction of Europe."

This scholarly dissertation, the preparation of which must have caused infinite toil, merits the careful consideration of all historians of the period 1920-31.

F. J. C. Hearnshaw.

[10] *The Conference of Ambassadors* (Paris, 1920–31). By Gerhard P. Pink. (Geneva: The Research Centre). 1943. 80 *cents* or 3.50 Swiss *francs*.

PRINCIPLES OF PRIVATE INTERNATIONAL LAW.[11]

For many years Professor of Law at the University of Berlin, and writer of a well-known German text-book on private international law, Professor Nussbaum became visiting Research Professor of Public Law at Columbia University and devoted several years to the study of the American system of Conflict of laws. As a result of this experience (he tells us) a new picture of the subject "gradually took shape in my mind," and "this volume tries to reproduce it in terms of American law." The general method of exposition followed in the book is, however, not particularly American. Perhaps it would be true to say that the framework and mode of approach show traces of Professor Nussbaum's continental background, informed and illustrated by his knowledge of American doctrine and case law. From this point of view the book seems more valuable to a foreign student of the common law doctrine of conflict of laws who is accustomed to Professor Nussbaum's approach, than to an ordinary student born and bred in the common law tradition. The latter will hardly find in it an adequate statement of common law doctrine; and if, on the other hand, he should expect a critical appreciation of that doctrine he may be disappointed by this work. The expert, however, as distinguished from the ordinary student, will find it an interesting and useful work. It is divided into three parts. In the first part Professor Nussbaum discusses the object and name of private international law, its theoretical basis, its literature and the history of the subject in general and in the United States. The second part is devoted (under the general heading "Choice of Law Rule") to various aspects of that topic. The third part, under the heading "Procedural Questions," deals with Jurisdiction and Foreign Judgments. It will be seen that the book does not cover the whole field of Private International Law, but only certain selected topics—topics, however, which from the general point of view are of outstanding interest. The chapter on Public Policy is stimulating and might well have been expanded; so too the section dealing with the "proper law of the contract." The bibliography seems inadequate in relation to the method of treatment adopted in the book. The author has perhaps an excessive weakness for the word "conceptual," an expression which is not so lucid as to require no explanation, and not so valuable as to justify constant repetition. Indeed, a tendency to attack or repudiate the doctrines of those with whom he disagrees, without adequately stating the grounds on which his dissent is based, is to be discerned throughout the book. This is regrettable because it is evident that a person of Professor Nussbaum's distinction and learning could by expanding considerably certain sections of the work make it far more valuable. It suffers at present from an inadequate development of many arguments which are cut short all too soon. One's appetite is whetted but not fully satisfied. It is to be hoped that Professor Nussbaum will some day produce an enlarged version of this work. J. M. J.

THE LAW OF NATIONS.[12]

It is not necessary to say much, and that belatedly, as to this little book, a third edition of which is adequate proof that its excellence is admitted and its popularity established. Its scope, limited to the Law of Peace, heightens its usefulness, for submarines and aeroplanes have driven wide lanes through the laws of war, and the Neutrality which engaged so much of our attention in earlier days appears now to be a suspensory state of anxious calculation of the chances and barely concealed leanings towards the belligerent who appears most likely to succeed. A state of true Neutrality is, at present, hardly to be expected.

Professor Brierly examines from a modern, but necessarily pre-war, point of view the character and jurisdiction of States and the methods adopted for the solution of their disputes short of war. For the novice and the layman who has an interest in learning in outline the system of legal relations between States as it existed in 1939 the book is most adequate, and much of what it contains will, we hope, be relevant in the brave new world of the rising generation.

Commendation in this place is all that is requisite. No independent author expects or desires, even in non-controversial writings, to say nothing from which dissent is possible. Thus the statement on page 130 that the Mandate over Palestine is in many respects closer to the B than to the A Mandates seems to be inadequate. In actual fact the administration of Palestine in so far as I could judge from personal knowledge, is a British Administration of the Crown Colony type. Indeed, it was currently spoken of as merely the Crown manifesting itself in a new incarnation. And the official opinion accepted as a fact that a British subject could become naturalized in Palestine and yet retain British nationality.

Professor Brierly evidently considers the Mandate system rather as a gesture in the right direction than as the solution of a problem. Our enemies give a more sinister interpretation. But there is good ground for deeming the gesture to have been sincere, however unsatisfactory some of the reservations, evasions and results. F. M. G.

[11] *Principles of Private International Law.* By Arthur Nussbaum. (Oxford University Press.) 1943. Pp. xvi, 288. $3.50.

[12] *The Law of Nations.* An Introduction to the International Law of Peace. By J. L. Brierly. Third Edition. (Oxford University Press.) Pp. 272. 6/-.

THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION.[13]

FEILCHENFELD'S monograph is devoted to a subject which is getting more important every day and will be of particular interest after the breakdown of the Axis Powers, when statesmen, economists and lawyers of the United Nations will be confronted with the superhuman task of rebuilding a legal order and reinstating the rule of law in the territories both materially and morally devastated by nazism and fascism and their nihilistic doctrines.

The title of the book *The International* Economic *Law of* Belligerent *Occupation* is an understatement in two respects:

(1) The author deals not only with the *economic* law of belligerent occupation, but with the law of occupation in general though his chapters devoted to economic and financial questions, particularly those on banking, money and currency are written *con amore* and obviously are the author's particular province.

(2) The book is not restricted to questions of *belligerent* occupation. Mr. Feilchenfeld rightly devotes a whole chapter (V.) to problems of occupation during an armistice, of continued occupation after a peace treaty, and peaceful occupation. Of particular interest and originality are the author's remarks on what he calls "Quasi-final armistice occupation" (para. 420 *et seq.*).

The study covers the positive international law of occupation such as it was at the outbreak of the present war. Developments since 1939 have purposely been omitted from the survey.

In the Hague Regulations respecting the Laws and Customs of War on Land Ernst H. Feilchenfeld sees a late codification of a body of law adopted in an atmosphere of 19th century liberalism, shaped by the basic philosophy of that era, and drafted with regard to the conditions of a 19th century liberal world. They had to be applied, shortly after their adoption, in a world in which fundamentally different concepts and conditions became increasingly prominent. Communism in Russia, the abandonment of the *laissez faire laissez aller* principle throughout the world, state planning, social policy, currency measures and manipulations, the growth of public institutions and of property regulations; tendencies towards state socialism; fundamental changes in warfare, increase in the percentage of civilians, including women, called on for war work, increase of the number and percentage of military targets: all these were factors incompatible with the basic principles of the Hague Regulations. Partly under the impact of those factors, which for at least 25 years prior to August, 1939, had been increasing in intensity and scope, partly through the growth of a spirit of international lawlessness, the actual treatment of the occupied regions and their inhabitants had constantly deteriorated. Yet, recognition of the rules of the Hague Regulations had survived and though the law of occupation was in August, 1939, in an advanced state of precariousness, a broad statement either by the Allies of the 1914–1918 War or by the United Nations during the present conflict to the effect that the law of occupation had been destroyed by Germany would merely have led to a state of affairs in which no basis for legal protests would have been available. Tendencies towards state socialism and total warfare do not obviate the distinction between sovereigns and mere occupants, between provisional occupation and final annexation. But even here new aspects have arisen. Under modern conditions, countries are frequently in a stage of profound transition which tends to be accelerated during a long war. Should this transition and acceleration, the author asks, be interrupted in occupied countries and their structure frozen? He points out that some political structures meet today with sincere disapproval of other countries. Should an occupant, for instance, be forced to respect in an invaded fascist region both racial discrimination and the suppression of free speech? Or, as M. de Baer put it (*Sunday Times*, March 14, 1943): "Is the result of our victory to be that in a country occupied by our own armies, the extravagant Nazi laws concerning racial discrimination, the segregation of Jews, sterilisation, castration, and those concerning the subservience of the courts of Justice to the arbitrary will of the executive, will remain in force? Are we going to allow that the treasures robbed from occupied countries (and, one would add, from political or racial opponents), be considered as 'private property' and remain in the possession of the bandits who have stolen them?"

Until agreement on new rules has been reached or until the United Nations have developed new rules, new factors do not change the law of belligerent occupation automatically. Shortly after the publication of Feilchenfeld's study the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control, London, January 5, 1943, Miscellaneous No. 1 (1943) Cmd. 6418, has been made and the author would, no doubt, classify this document as the nucleus of such a body of new rules.

In the chapters on the "Treatment of Property" and on "Public Finance" the author gives a survey of the positive law, state practice and literature on this subject. The difficult and highly controversial problems of lawmaking in time of occupation and of the treatment of organizations is dealt with under "Regulation and Organization" where particular care is devoted to the position of (private) Railways and of Central Banks. In the chapter "Relations Between Jurisdictions" the author gives a survey of those doctrines which in traditional International law have centred around terms such as *ultra vires, uti possidetis, jus postliminii, status quo ante bellum* and *retroactivity*. The decisions of international and

[13] *The International Economic Law of Belligerent Occupation.* By Ernst H. Feilchenfeld. Published by the Carnegie Endowment for International Peace, Washington, November, 1942. Pp. xii, 181. $1.50.

municipal courts, particularly those which were made available to the international public through the medium of the *Annual Digest*, are made use of exhaustively.

The author's decision not to include into his survey the development since August, 1939, is justified by the fact that the present state of flux would render comment of a doubtful value only.

Unfortunately, war time conditions obviously prevented the author from having regard to recent English authorities such as *In re Amand* 1 and 2 and *Lorentzen* v. *Lydden* or to the criticism to which the Bank of Ethiopia case was subjected, e.g. in *British Yearbook of International Law* (1938), 237. McNair's "Municipal Effects of Belligerent Occupation" (*Law Quarterly Review*, January, 1941) does not seem to have been available to him either.

Apart from minor inaccuracies (e.g. the statement that Germany conquered Montenegro, on p. 123, or that "the German annexations of Austria and Czechoslovakia were so rapid that no occupation stage was involved" on p. 23) Feilchenfeld's book gives a reliable and comprehensive treatment of its subject and is indispensable as reference for all those who will have to deal with questions of a similar kind during and after the present war.

EGON SCHWELB.

A CODE OF THE CRIMINAL LAW OF PALESTINE.[14]

THE tendency to-day in the Colonies is to standardize the local law whenever practicable in English lines, irrespective of local historical antecedents. Thus the Criminal Code of Palestine (1936) has no historical roots in that territory,[15] and reproduces with changes an English code already in force in other Colonial possessions. The Ottoman Criminal Code, French in character though modified to suit Moslem requirements, is thereby superseded. Sec. 9 of the new Code expressly provides that its interpretation should accord with the principles of legal interpretation obtaining in England. This indeed opens up a wide field to the Palestinian lawyer, of which however, the Bench rather more than the Bar is at present able to take advantage.

The Code has been twice amended since its promulgation. There exists in addition, as is inevitable, a large number of Ordinances creating offences mainly, but not exclusively, of a minor character. Mr. Gordon seeks in this book to gaide the practitioner through the complex of penal law thus established and to collate the illustrative decisions of the Palestine Courts relative thereto. Whether these decisions should be treated in Palestine as "binding" precedents may be questioned, though no doubt their value for citation may be considerable. English decisions where relevant would seem to have more authority.

Mr. Gordon mentions as "deplorable" the lack of a text-book on the Criminal Law of Palestine. As the law is on the whole definitely English in character, and English interpretation of the Code is made authoritative, the discreet use of standard English text-books and English cases should, one would think, prove adequate for the present. A comprehensive text-book dealing with Palestine law in particular might well wait till a more convenient season. This, however, does not apply to such a work as that under review. Mr. Gordon's book does not profess to be a textbook but a guide to a complex of law, and such a compilation will undoubtedly be very acceptable to the practitioner. In an appendix he seeks to assist the student by some general discussion and references to English cases, and this section might with profit have been enlarged. On the whole he is certainly to be congratulated on having accomplished a tedious task in a workmanlike manner.

F. M. G.

GOUVERENEMENTS NATIONAUX ET ACCORDS INTERNATIONAUX.[16]

IN this book the author seeks to emphasize the need that all countries should intensify their international relations, and this he does in an interesting manner.

To succeed in this aim, declaration of will by individual governments must be facilitated. The author expounds many cases in which not only the long procedure of parliamentary approval is abandoned, but also the national rule in a country is made to depend upon the decision of an international authority.

His analysis, in view of the wide field, is limited to few States. The author proposes to apply it to two European States, namely, France and Switzerland, and two Anglo-American States, namely, Great Britain and the United States, each of which groups contain one centralized State (France-Great Britain) and one federal State (Switzerland-United States), but the unhappy situation of France induces him to limit it to three. The results of such an enquiry may be extended to all other countries entering into agreements with the three.

[13] *A Code of the Criminal Law of Palestine.* By E. D. Gordon, LL.B. (Haifa: Oth Co-operative Press.) 1943. Pp. 336.

[14] The Code of 1936 had, however, been preceded by a series of amending Criminal Ordinances, e.g. Criminal Law Amendment Ordinances, 1927; Perjury Ordinance, 1929; Seditious Offences Ordinances, 1929, 1932, etc. These were repealed and for the most part incorporated in the Code.

[15] *Gouverenements nationaux et accords internationaux.* By Theodore De Felice, Diplome de l'Inst. Univ. de Hautes etudes int. Geneva, 1942. Pp. 104.

As regards each of these States, the author studies the internal constitutional rules; the extension of power of the executive with regard to internal rules and with regard to international treaties; special power possessed by particular officials; international agreements signed by a Chief of State not regularly authorized. Going through these numerous cases, the fact emerges that the Chief of State is often in a position to establish rules to his country without interference of Parliament and to put international treaties into practice without parliamentary approval; particular public offices may also come to decisions without the previous consent of national authorities; so again particular officials may act abroad in the interest of a foreign country and the Chief of State could sign treaties without previous parliamentary or other authorization. The author emphasizes the difference between these various cases and normal *delegation of powers,* common to all democratic countries. He examines the problem as to whether it is desirable to encourage such extension of power, and tends to favour it. He shows that while the *decree* in substitution for a *parliamentary act* is drafted in each country in secrecy and in haste, the plurilateral agreements are discussed in public and each proposal is carefully considered. The author thinks that the rules given by a body representing many States may be considered as the expression of the wishes of the greater part of mankind, and, as such, it follows a democratic procedure.

At the close of this interesting analysis one would wish to find a corresponding theoretical demonstration, which might be a valuable contribution in relation to international and constitutional law, in this new phase of international relations.

The author shows himself perfectly equipped for such a difficult task; it may be hoped that he will achieve his aims with the appreciation of all interested in an international reorganization.

M. Sarfatti.

THE UNITED STATES AND NEUTRALITY.

The profound influence exercised by American thought and policy upon the development of the doctrine and practice of neutrality is common knowledge. It was indeed with Washington's famous proclamation of April 22, 1793, that this branch of international law—then in a rudimentary and confused state—began to take shape. What is less widely known is the part played by John Marshall, the "expounder of the Constitution," in defining and defending what has been aptly called "neutrality in the American sense"—a noteworthy achievement, if one remembers that the United States was then making its debut in the family of nations. As one of the envoys to France in the XYZ affair, as Secretary of State (if only for a short time), and lastly as Chief Justice of the United States, he made decisions of far-reaching historical and legal importance on the delicate problems which arose in quick succession out of the French Revolution, the Napoleonic wars, and the struggle for independence of the Latin American colonies. His work in this sphere, which his achievements as expounder of the Constitution have tended to obscure, is recalled by Dr. Ziegler of Amherst College in *The International Law of John Marshall*[17]—a book which, apart from the light it sheds on a neglected aspect of the great Chief Justice's career, is a valuable analysis of the origins of the American doctrine of neutrality.

The doctrine reached its highwater mark in the *Alabama* claims in the second half of the 19th century. The present century has seen its decline and perhaps its death. The repeal of the arms embargo, the Lend-Lease Bill, and the destroyer deal were progressive departures from that attitude of impartiality in dealings with belligerents, traditionally regarded as the counterpart of the right to remain neutral proclaimed by Marshall. How is one to explain this *volte-face* ? The fact—as Mr. Harold Bartlett Whiteman observes in his paper *Neutrality,*[18] one of the undergraduate prize essays of Yale University—is that "in the world of to-day, with our economic interdependence, our daily newspapers, our radio, it is impossible for a nation to remain impartial long in a conflict which involves two or more major powers." Whether this will involve the total disappearance of neutrality or merely result in its transformation into some system like the "neo-neutrality" described by Mr. Whiteman, it is impossible to forecast.

In 1917 President Wilson declared that we were at the beginning of an age in which it would be insisted that the same standards of conduct and responsibility for wrong done should be observed among nations and their governments that are observed among the individual citizens of civilised states. In 1625, Grotius had proclaimed it the duty of those who keep out of a war "to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered"—a view which all law-abiding nations would probably endorse to-day. The wheel, it would seem, has come full circle.

M. F. P. H.

[17] *The International Law of John Marshall.* By Benjamin Munn Ziegler, Assistant Professor of Political Science, Amherst College. (The University of North Carolina Press, 1939.) Pp. xii. 386. $3.50.

[18] *Neutrality* 1941. By Harold Bartlett Whiteman, Jr., Undergraduate Prize Essays. (Yale University, vol. III.) Pp. ix, 71, 6/-.

AN INTERNATIONAL POLICE FORCE.[19]

THIS book is a careful and well-documented history of origins and early years of the Metropolitan Police Force. The author devotes the greater part of his book to evolution and ultimate acceptance of " the Principles of Police " during the eighteen-thirties. The primary function of the police is preventive, and their power to fulfil this function is dependent upon the public's approval of their existence, actions and behaviour. This was demonstrated during the political and economic disturbances of the thirties, and the public's acceptance of the police was due, as the reader will learn, to the single-minded devotion to duty of the first Commissioners, Rowan and Mayne. Of particular interest at this time is the author's suggestion that an international police force on the British model be formed for the primary purpose of ensuring the observance of whatever international disarmament regulations are made after the war. Such police should have under disarmament regulations the power " to investigate certain specified activities in their area; to enter factories, docks and warehouses; and to require the production of clerical and other records and to inspect them." Any infringements of the disarmament regulations so discovered would result in the offending nation being summoned before the Disarmament Court and penalized for breach of the disarmament regulations either by fine or confiscation of material or both.

The panacea for the world's ills devised after the last war was democratic government on the Anglo-American model; the author proposes after this war peace would be ensured by the introduction into the international sphere of police on the British model. Making full allowances for the novelty of the idea and the skill of the author's presentation, it does not follow that the prevention of English riots by English police, the efficacy of whose efforts was founded on the English public's approval, demonstrates that the English police idea will alone succeed in preventing the growth of armaments which would have the support of strong and in some cases united national feeling.

K. G. M.

NEW EDITION OF WHEATON'S INTERNATIONAL LAW.

A GRAVE difficulty confronts the writer on Public International Law to-day: his subject is for the most part in a state of flux. He can retrace the chequered history of relations between States from the time of the Greek Amphictionies, recall the moderating and humanizing influence of the Church in the Dark and the Middle Ages, indicate landmarks like the publication of Grotius's *De jure belli ac pacis* or the creation of the League of Nations some three centuries later, analyse the provisions of charters of international right such as the Hague Conventions, but he can give no clear answer to many of the burning questions of the day. The League has failed as an instrument for the prevention of war: a retrograde and pagan conception of the State has been revived, brooking no rival loyalties and seeking to reconstitute what Renan thought Christianity had shattered for ever: *le faisceau terrible de l'omnipotence romaine.* As a result, International Law has suffered a virtually total eclipse, and the form in which it will emerge from this crisis can only be conjectured.

It is not surprising, therefore, that the late Professor A. Berriedale Keith found it necessary to postpone the appearance of Vol. I of the seventh edition of *Wheaton's International Law*: this deals with Peace, a topic the treatment of which must be materially affected by the important changes in international organization inevitable after the present war. The conflict, on the other hand, has not affected to any large extent the treatment of the laws of war, though it has added to the mass of the material, and it has thus been possible to issue Vol. II, which deals with War. The edition[20] includes the section on " The Prevention and Settlement of International Disputes " which figured in Vol. I of the 1926 issue, and embodies the additional material available in October, 1943, the date of the Preface. It refers, *inter alia,* to the use of electro-magnetic mines, the mass deportations carried out in Europe, the wanton destruction of cities like Kharkov, and the shackling of British prisoners. It also discusses at some length non-belligerency and other forms of qualified neutrality which have become a prominent feature of international relations.

The repeated violations of the rules of warfare by Germany and her satellites—due in part to the dangerously convenient doctrine of military necessity: *Kriegsraison geht vor Kriegsmanier*—warrant Professor Berriedale Keith's conclusion that it is idle to seek to regulate violence. It may indeed be argued that the complacency induced by the belief that it is possible to regulate war has been responsible for the half-heartedness of the efforts so far made to proscribe it. It has been said that " the separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of international law," but the triumph has proved short-lived. War can no longer be treated " as a matter for the forces alone, on the analogy of the duel in private law." With its ever-increasing destructiveness, it now affects the whole population.

[19] *British Police and the Democratic Ideal.* By Charles Reith. (Oxford University Press, 1943.) 12*s.* 6*d.*

[20] *Wheaton's International Law.* Seventh English Edition. By A. Berriedale Keith, D.C.L., D.Litt., Hon. LL.D. Vol. 2: War. (London, 1944.)

In the 1926 edition of the treatise Professor Berriedale Keith expressed some scepticism as to the possibility of bringing war criminals to book.

> "The French law courts held . . . the somewhat dubious doctrine that municipal tribunals can properly deal with war criminals if found within their territorial jurisdiction at any time, and a certain number of sentences for atrocities were passed *in absentia*. It is not surprising that proposals have been made to secure trials of criminals of this type by neutral tribunals, but the probability of anything effective being devised, despite the efforts of the International Law Association, is negligible."

The present edition reproduces this passage, which the Preface, however, qualifies with the remark that the unconditional surrender of the enemy forces "will leave it to the Allies to determine at will the punishment for war crimes."

It is unavoidable in a work of this kind that obscurity should at times result from the compression of a mass of matter within a relatively small compass. The account on p. 216 of the circumstances of the bombardment of Strassburg in the Franco-German war may be given as an instance:—

> "Thus, in the Franco-German war, the Germans allowed the departure of non-combatants from Strassburg, as they resolved to carry the town by assault; they refused it in the case of Paris, which they proposed to reduce by famine, at St. Denis, Thionville, Péronne and Strassburg."

The facts are that the German commander at first rejected the plea of the Bishop of Strassburg that certain sections of the civilian population should be allowed to leave, but he subsequently gave way under Swiss pressure.[21]

As there is sure to be another edition of this book, it may be useful to point out a number of printer's errors. Sakhalin is spelt Saghalien on p. 91 and Sakhalien on p. 176. *L'ordre et la vie publice* on p. 236 should be *L'ordre et la vie publics*. "Occorded," line 11 p. 395, is an obvious misprint for "accorded."

Part of the third sentence in the second paragraph of p. 71 has been left out. An account of the United Nations' arrangements for consultation has irrelevantly crept into a paragraph on the use of semi-barbarous troops (p. 177).

M. F. P. Herchenroder.

DOCTOR EDWARD BENESH.[22]

It was a happy thought of the Association of Czechoslovak Advocates Abroad to publish a collection of essays as a tribute to Dr. Benesh on his sixtieth birthday. Dr. Benesh's contribution to the strengthening of the Rule of Law in international relations is described by Dr. Drucker. With unswerving loyalty to the idea of the League of Nations, infinite patience and great skill, Dr. Benesh worked in Geneva as much as any other statesman. Dr. Ecer describes the part Czechoslovakia played in the battle for international justice. Other contributors to the book are concerned with problems of constitutional law, theory of jurisprudence and of private international law. Were the book published for the benefit of those who do not read Czech—in English—it would find many readers.

V. R. Idelson.

The following publications have also been received[23]:—

Barker, F. H. *The Modern Prison System of India.* (London: Macmillan and Co., Ltd.) Pp. xvi. 139. 10s. 6d.

Canada: *Proceedings of the 26th Annual Meeting of the Canadian Bar Association at Winnipeg.* (Ottawa: National Printers, Ltd.) Pp. 404.

Domke, Martin. *Trading with the Enemy in World War II.* New York: Central Book Co.) Pp. xv. 640.

Douie, Vera. *The Lesser Half.* (London: Women's Publicity Planning Association) Pp. 100. 1s. 6d.

Forsey, Eugene A. *The Royal Power of Dissolution of Parliament in the British Commonwealth.* (Canada: Oxford University Press.) Pp. xix. 316. $5.00.

Humphrey, John F. *The Inter-American System—A Canadian View.* (The Macmillan Co. of Canada, Ltd., Toronto.) Pp. xi. 329. $3.00.

Professor Humphrey discusses the difficult question of the extent to which Canada should participate in Pan-American activities. His book provides an admirable survey of the origins and history of the Pan-American movement together with Canada's relation to it. As a result he finds that "of all the American nations Canada alone does not belong to the Pan-American Organization." Her abstention in the early years is easily explained: it was natural for her to remain outside as long as she did not possess full international status, and this notwithstanding the fact that during the whole period of Canadian colonialism the Pan-American system was predominantly non-political in

[21] *Traité de Droit International Public.* By —. Fauchille. 1921. Tome II, para. 1099.
[22] *Pocta.* K Sedesatym Navofeninam Presidenta. Dr. Edvarda Benese. (London, 1944). Pp. 109.
[23] Mention here does not preclude review later.

character. The difficulty, as he conceives it, was that membership in the system could not be harmonized with her colonial status. But developments have changed the whole situation. He now considers that Canada should join the union of American States, as by so doing she would be fulfilling an obvious international duty. Moreover, developments since his book was published have emphasized the contention that Canada cannot afford to remain outside the rapidly developing system of hemisphere defence. Professor Humphrey then goes so far as to observe that if Canada were to do so the other American nations may conceivably take some action which would be against her interests or, what is more likely, simply fail to take her interests into account. Next, he finds that there are important economic reasons for Canada to join the Pan-American system, and to this he adds cultural advantages that would result from closer relations with Latin America. He then considers the objections to joining the union, as well as compromises such as occupying the position of observer, and comes to the conclusion that Canada's future relations with the American republics cannot be based on any half-way expedients. "Canadians owe it to themselves and to the American community of which they are privileged to form part that their country should co-operate fully and whole-heartedly with the other American nations in the efforts that are being made to bring order to at least one part of the world's surface. Canada has a service to perform in this hemisphere."

India: *General Statutory Rules and Orders made under enactments in force in British India.* Volume V. (India: Manager of Publications, Delhi.) Pp. 278. 16s.

Supplement to the General Statutory Rules and Orders made under enactments in force in British India, Third Edition. (Manager of Publications, Delhi.) Pp. 278. 16s.

Keen, F. N. *The Future Development of International Law.* (London: The Grotius Society.) Pp. 50.

Latin-America: *The Handbook of Latin-American Studies,* 1941. No. 7. Edited by Miron Burgin. (Harvard University Press: Cambridge, Mass., Humphrey Milford.) Pp. xv. 649. 22s. 6d.

The latest addition to the series of Latin-American Studies which has been received in this country contains a section devoted to law from the pen of the late Librarian of Congress, Mr. John T. Vance, whose death was such a serious loss to bibliography. He notices the interest which has been developed in Latin-American law in law schools and other institutions in the United States, which hitherto, in his words, "have been marked by a stubborn Isolationism." He welcomes this reversal, and regarded it as a sign of a growing interest in the study of comparative law. Mr. Vance noted the project for the establishment in Washington of an Institute for Inter-American Law, and stated as a precedent that during the first World War the Germans founded an Institute for Comparative Law. Perhaps his suggestion for a translation into Spanish of the Restatement of the Law is one more congenial and likely to be welcomed in other countries. There is much to be said for the nations primarily influenced by the Spanish and Continental systems of law to be able to appreciate the Anglo-American system. It may be added that the other sections of the book are introduced by authorities in the respective subjects in a similar illuminating manner, and also followed by bibliographies compiled with expert care.

McNair, Sir Arnold Duncan. *Legal Effects of War.* (Cambridge University Press.) Pp. xx. 416. 25s.

New Zealand: *Appendix to the Journals of the House of Representatives of New Zealand. Session* 1941. (With index.) Volume I and Volume II. (Wellington: E. V. Paul, Government Printer.)

Protection against Group Defamation. (London: World Jewish Congress.) Pp. 40. 2s.

Royal Empire Bibliographies: No. 10, by Evans Lewin, M.B.E. Best Books on the British Empire. (Royal Empire Society, 1943.) Pp. 90. 2s. 6d.

Taborsky, E. *The Czechoslovak Cause.* (London: H. F. and G. Witherby.) Pp. ix. 158. 12s. 6d.

The Problem of Statelessness. (London: World Jewish Congress.) Pp. 40. 2s.

Wille, George, K.C., LL.D. *Principles of South African Law.* (Juta and Co., Ltd.) Pp. xxxviii. 426. 35s.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Arquivo de Direito Militar; Australian Law Journal; Bombay Law Journal; Bombay Law Reporter; Calcutta Weekly Notes; Canadian Bar Review; Colombia Law Review; Eugenics Review; International Labour Review; International Review of Agriculture; Journal of the Parliaments of the Empire; Juridical Review; Law Quarterly Review; Madras Law Journal; Medico-Legal Review; Modern Law Review; New York University Law Quarterly Review; Revista Juridica de la Universidad de Puerto Rico; Revue Internationale de la Croix Rouge; South African Law Journal; Toronto University Law Review; Tulane Law Review.

THE JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW

THIRD SERIES—Vol. XXV
Parts I-II

Issued to Subscribers only May, 1943